# CASES

## ARGUED AND DETERMINED

IN

# THE SUPREME COURT

OF

## THE STATE OF MISSOURI.

JANUARY TERM, 1874, AT JEFFERSON CITY.

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STATE OF MISSOURI, Defendant in Error, *vs.* BENJ. JONES, Plaintiff in Error.

1. *Practice, criminal—Evidence—Confessions.*—In order that a confession may be received in a criminal case, it must be voluntary; it will be excluded, if it was induced by a promise of benefit or favor, threats of intimidation or disfavor, by a person having authority in the matter.
2. *Practice, criminal—Confessions—Admissibility of.*—When a confession has once been obtained by means of hope or fear, subsequent confessions are presumed to come from the same motive, and are inadmissible, unless it is shown that the original motives have ceased to operate.
3. *Practice, criminal—Confessions—Artifice.*—Confessions are not inadmissible because produced by artifice; *e. g.*, by persuading the prisoner, that his accomplices were in custody, or that they had divulged the facts relative to the crime.

*Error to Cole Circuit Court.*

*E. L. King & Bro.*, for Plaintiff in Error.

I. The confession of the defendant was inadmissible in evidence. (State vs. Brockman, 46 Mo., 566.)

*J. R. Edwards*, for Defendant in Error.

WAGNER, Judge, delivered the opinion of the court.

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The only question at all important to be considered in this case is, whether the confession made by the defendant was properly admitted in evidence against him. From the record it appears, that the defendant, with several others, was indicted for killing one Hildebrand in Moniteau County.

A short time after the commission of the murderous act, the defendant was arrested in Miller County. He denied all knowledge of the crime, and the party, in whose possession he was, hung him twice by the neck, and extorted a statement from him in regard to the murder. He was then taken back to Moniteau County, and when he arrived in California, the county seat of that county, and whilst he was sitting on his horse, one Hickox went up to him and shook hands with him, and told him that he was sorry to see him in the fix that he was in. The prisoner said that he had done nothing. Hickox then told him that he was afraid he was in a very bad fix, because Blankenship (who was alleged to be a participator in the crime) had said, that the prisoner and two other men had come to his house, and forced him to pilot them through the prairie to Hildebrand's house, and therefore the prisoner must be the murderer. The prisoner then asked Hickox, did he say that? And Hickox replied, that he did, and that he, the prisoner, must know whether it was true or not. The parties then separated, and afterwards the prisoner sent for Hickox to come and see him in the back room of a store-house, where he was confined. He then said to Hickox, that Blankenship had betrayed them, that he had made up his mind to tell the whole thing, and he then made a detailed confession of all the facts relating to the murder.

Before a confession can be received in evidence in a criminal case, it must be shown that it was voluntary. And a promise of benefit or favor, or threat of intimidation or disfavor, held out by the person having authority in the matter, will be sufficient to exclude a confession, made in consequence of such inducement, either of hope or fear. (State vs. Brockman 46 Mo., 566.)

In this case, Hickox, the person to whom the confession

was made, was a private citizen, had no authority in the matter, nor does it appear that any threats or inducements were held out from any source to obtain the confession. It is true, that on the preceding day the prisoner had been brutally treated; but that had been done by a different party, and it is not shown, that any of them were present exerting any influence when the confession to Hickox was made.

Where a confession has once been obtained by means of hope or fear, confessions subsequently made are presumed to come from the same motive; and, if it is not shown that the original influences have ceased to operate, they are inadmissible. (1 Whart. Crim. Law, § 594; Roscoe Crim. Ev., 45; Peter vs. The State, 4 Smed. & Mar., 31; Comm. vs. Harman, 4 Penn., 269; Van Buren vs. State, 24 Miss., 512.)

The cases above cited show, that in each instance the prisoners were intimidated, and under the influence of threats made the confessions before the magistrate when they were being examined, and the subsequent confessions were made before the same magistrates upon the basis of the first ones. As the magistrates were persons in authority, and were regarded as having the prisoners in their power, it would be necessary to show, that the fear, under which the first confession was made, had ceased before the second one could be received. The presumption would be, that under all the surroundings it was not voluntarily made, and that presumption would have to be removed by evidence. I can find no authority, however, for the rejection of the confession in the case now under consideration. It was not made to any of the parties who had previously been guilty of inflicting the outrage on the prisoner. It was made without solicitation, and without any inducement being held out, after the prisoner had considered the matter and come to the determination to make a full disclosure. Hickox had no authority or power in the case, and was incapable of rendering any favor or relief by virtue of official position. Of all this the defendant was well aware, and nothing was said to him to produce a contrary belief. He was impressed with the idea, that Blankenship had

betrayed him, and therefore he considered that he might as well tell the whole truth. Whether Blankenship had made the disclosure and exposed the crime, is of no importance.

Had it been a mere artifice, the case would not be altered; as no objection can be taken because the confession was made under a mistaken supposition, that some of the defendant's accomplices were in custody, or that they had divulged the facts in relation to the crime, and this would be so, even though the suppositions were created by artifice, with a view to obtain the confession. (1 Whart. Crim. Law, § 691; Roscoe's Crim. Ev., 47; R. vs. Burley, 2 Stark. Ev., 12 n.; 1 Phil. Ev., 164; 2 Russ. Cr., 845.)

Under every view that we have been able to take of the case, the confession seems to have been entirely voluntary. It was made without any threats, fears or hopes. Not only so, but it was made without solicitation emanating from any source. The prisoner sent for Hickox, asked for the interview, and said that, after thinking over the matter, he had concluded to divulge the whole truth. There is here an utter absence of all the tests which would warrant the exclusion of the confession. I think it was properly admissible in evidence, and that the court did not err in permitting it to be received.

The prisoner was convicted of murder in the second degree, and sentenced to the penitentiary, and the judgment of the court below is affirmed. The other judges concur.

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MICHAEL WACK, Plaintiff in Error *vs.* ALFRED STEVENSON, JAMES W. SPARKS, ROBERT CARPENTER AND LEONIDAS W. SCOTT, Defendants in Error.

1. *Sheriff's deeds—Recitals—Judgments—Executions.*—A sheriff's deed set out fully certain judgments, and also set out certain executions, but failed to couple the executions with the judgments, but the names of the parties and the amounts, as set out, were identical. *Held*, that it was inferrable that the executions were on these judgments, and that such omissions are not fatal to the deed, inasmuch as they could mislead no one.

2. *Sheriff's sales—Executions, expiration of—Venditioni exponas.*—A sale by a sheriff under a *venditioni exponas* on an execution, which may have expired, is void.

*Error to Lafayette Circuit Court.*

*H. C. Wallace and Henry Flanigan*, for Plaintiff in Error.

I. This sheriff's deed shows that it was made in consummation of a sale made under a several execution in the nature of a *venditioni exponas*, issued under the act relative to executions, approved March 3rd, 1863.

II. The recitals in this sheriff's deed show authority to sell, and that the sale was made substantially according to law, which is all that the law requires. (Wagn. Stat., 612, § 54; Stewart vs. Severance, 43 Mo., 322; Carpenter vs. King, 42 Mo., 219; Buchanan vs. Tracy, 45 Mo., 437; Samuels vs. Shelton, 48 Mo., 444; Porter vs. Mariner, 50 Mo., 364; McCormick vs. Fitzmorris, 39 Mo., 24; Reed vs., Austin, 9 Mo., 722; Landes vs. Perkins, 12 Mo., 238; Carson vs. Walker, 16 Mo., 68; Waddell vs. Williams, 50 Mo., 216; Perkins vs. Dibble, 10 Ohio, 433; Sneed vs. Reardon, 1 Mar. [Ky.], 217; Natchez vs. Minor, 10 Sm. & Mar., 246; Hardy vs. Heard, 15 Ark., 184; McDonald vs. Gronefeld, 45 Mo., 28; Wood vs. Messerly, 46 Mo., 255.)

*W. D. Bush, with Ryland & Son, and X. Ryland*, for Defendants in Error.

I. The sheriff's deed failed to recite facts which the statute requires shall be recited in such a deed. (Wagn. Stat., 612, §§ 54 57; 36 Mo., 115; 37 Mo., 194.)

II. It does not recite the date of the execution under which levy was made. (6 Mo., 361; 9 Mo., 718; 46 Mo., 432; 45 Mo., 28; 18 Mo., 580; 47 Mo., 356; 36 Mo., 115; 1 Mo., 368; 1 Mo., 518.)

*X. Ryland*, for Defendants in Error.

I. The deed did not show that the levies were made under executions subsisting in force at the date of said levies. It does

not appear from what judgments they were issued; the date of the judgments is not given, nor of the executions under which they pretended to make said levies, and even if said levies were valid when made, not being kept alive by law, they were not revived by the executions issued on the 11th of April 1864, under which the sale was made. (Wagn. Stat., 612, § 54; Tanner vs. Stine, 18 Mo., 580; Lackey vs. Lubke, 36 Mo., 115; Bank of Missouri vs. Bray, 37 Mo., 194; Turner vs. Keller, 38 Mo., 332; Stewart vs. Severance, 43 Mo., 322; McDonald vs. Gronefeld, 45 Mo., 28.)

NAPTON, Judge, delivered the opinion of the court.

The only question in this case is the sufficiency of a sheriff's deed. The deed was offered in evidence by the plaintiff, and being excluded by the court, he took a non-suit with leave to move to set it aside. It is useless to set out the petition or the answers, as nothing was determined in regard to the merits of the case, and the plaintiff, having purchased from the purchaser at the sheriff's sale, evidently had no case, if the deed of the sheriff to his grantor was invalid. The only matter therefore to be decided is the validity of this deed, which is as follows:

"To all whom these presents shall come, I, Jacob A. Price, as sheriff of Lafayette county, send greeting: Know ye, that whereas Coleman Jeffries and Sarah A. Jeffries on the 9th day of November, 1860, recovered a judgment against Alfred Stevenson, William S. Renick and James S. Reeves, in the Circuit Court of Saline county, Missouri, for the sum of $956.04 for debt and damages and also for costs, and that whereas William H. Trigg, on the eighth day of November, 1860, recovered a judgment against W. S. Renick, John D. Reeves, Alfred Stevenson and James T. Reeves in the Circuit Court of Saline county, Missouri, for the sum of $1,671.08, for debt and damages and also for costs, and whereas heretofore certain writs of execution were issued from the Clerk's office of said county aforesaid, one in favor of Coleman Jeffries and Sarah A. Jeffries, and against Alfred Stevenson, W. S. Renick and

James T. Reeves, and the other in favor of W. H. Trigg and against W. S. Renick, John D. Reeves and Alfred Stevenson and James F. Reeves, and directed to the sheriff of Lafayette county, commanding said sheriff that of the goods, and chattels and real estate of the defendant, Alfred Stevenson, he should cause to be made the debts and damages and costs aforesaid, and to satisfy said executions; and whereas Gabriel M. Jacques, the then sheriff of Lafayette county, levied upon the following real estate (here it is described) on the fourteenth day of November, 1860, for one execution in favor of the said C. and S. A. Jeffries aforesaid, and levied upon the same real estate on the fourth day of January, 1861, on the execution in favor of W. H. Trigg, and said executions having been returned unsatisfied by the then sheriff of Lafayette county; and whereas, afterwards, to-wit: said land was levied on by Jacob A. Price, sheriff of Lafayette county, to wit: (here the land is described) on the seventh day of December, 1863, in satisfaction of an execution of the said C. and S. A. Jeffries aforesaid; and whereas, afterwards, to-wit: on the eleventh day of April, 1864, two writs of execution bearing said date were issued from the Clerk's office of said Circuit Court aforesaid, the one in favor of Coleman Jeffries and Sarah A. Jeffries and against said Alfred Stevenson W. S. Renick and James F. Reeves, and the other in favor of Wm. R. Trigg and against W. S. Renick, John D. Reeves, and Alfred Stevenson and James T. Reeves, directed to the sheriff of Lafayette county, commanding him, that of the goods and chattels and real estate of said defendant, Alfred Stevenson, heretofore levied upon by J. M. Jacques, late sheriff of Lafayette county, and by said Jacob A. Price on the 7th of December, 1863, he cause to be made the debt and damages and costs aforesaid, and to have the same before the Judge of said court on the 9th day of May, 1864; and whereas I, the said sheriff, did advertise said real estate, etc."

As no objection is made to the remaining portion of this deed, it is unnecessary to insert it.

There are the usual statements of the time and place of sale, the advertisement, notice etc.

Our statute requires the deed to recite the names of the parties to the execution, the date when issued, the date of the judgment, order or decree, and other particulars, as recited in the execution; also a description of the property, the time, place and manner of the sale.

There are no objections in this case to the description of the property, nor to the statement concerning the time, place and manner of the sale.

The two principal objections to the deed are: First, that the judgments, on which the original execution issued, are not stated, or rather that the orignal executions are not connected with any judgment at all, and second; that the dates of the original executions are not given, and therefore it cannot be seen whether they were valid, subsisting executions.

The first objection is literally sustained. The sheriff does not state that the executions he recites were on the judgments he recites; but it is very clear that he means this, for the names of the parties to the judgments and executions are identical. It is not stated, that the executions were on these judgments in so many words, but it was clearly inferrable, and the judgments are set out and the parties to them and their date, and the amount of the judgments.

The omission to state, that the executions were on the judgments recited, could mislead no one, and is not therefore regarded as fatal to the deed.

The failure of the sheriff, to state in his deed the date of the executions recited, is a more serious objection. If the sale had been made under such executions, it would have been fatal. But in this case the sale was not made under the executions whose date is not given. The sale was under a *venditioni exponas*, the date of which is given; but if the executions, on which the *venditioni exponas* was based, might have expired, the sale of course would be void.

But the levies made on the original executions were made in November, 1860, and January, 1861, and the date of the judgments show, that such levies could not have been on executions that had expired. The judgments were obtained in

November, 1860. The sale was made in 1864, and evidently was based on the Act of March 3rd, 1863, which was construed by this court in the case of Turner vs. Keller, 38 Mo., 332.

The judgment will be reversed, and the cause remanded. The other Judges concur.

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JAMES B. COLT, Respondent, *vs.* JOSHUA LADUE, Appellant.

1. *Evidence—Res gestæ—Possession—Delivery—Statements.*—The statements of one in possession of personal property, when delivering it to another, are admissible in evidence as a part of the *res gestæ* and explanatory of the transaction.

*Appeal from Henry County Court of Common Pleas.*

*LaDue & Fyke*, for Appellant.

I. Sherman had sold this property to this appellant, prior to his conversation with Savage. The *ex parte* statements of a vendor of personal property, after the sale and transfer, do not bind the vendee. 35 (Mo., 202; 16 Mo., 242; Wilson vs. Woodruff, 5 Mo., 40.)

*McBeth & Price*, for Respondent.

I. Sherman's statements to Savage tend to show possession in himself, and that he was even then offering it for sale.

ADAMS, Judge, delivered the opinion of the court.

This was an action of replevin for a large ticket wagon. The plaintiff claimed as purchaser at sheriff's sale on an execution against one C. M. Sherman, and the defendant claimed title by virtue of a prior unrecorded mortgage for a debt due from said Sherman.

The material issue tried below was, whether the defendant took and retained possession of the wagon at the time he received the unrecorded mortgage. Each party gave evidence endeavoring to prove his theory of the case. One of plaintiff's witnesses testified, in effect, that Sherman left Clinton,

where he lived, and, at the time he left he had the wagon in dispute in his possession, and delivered the same with another wagon to witness to keep, and directed him to sell them; that witness took possession and sold one of the wagons, and the wagon in dispute was afterwards levied on by the sheriff.

The defendant objected to what Sherman told the witness about selling the wagon, &c. But the court overruled the objection, and the defendant excepted.

The case was submitted to the court, and no declarations of law were asked or given. The court found for the plaintiff, and entered judgment in his favor. The defendant filed a motion for a new trial, which was overruled.

The only material point is, whether the statement made by Sherman, when he delivered the wagon to the witness, was proper evidence. It was objected to as tending to impair the title held by the defendant by virtue of the unrecorded mortgage. But this evidence had no reference to the title created by the mortgage. Sherman had or assumed to have the actual possession of the wagon, and, in delivering it to the witness, made the statement in question. It was a part of the *res gestæ*, and explanatory of the transaction between him and the witness, and as such proper evidence. A mere delivery of the wagon without stating the purpose would have been utterly senseless.

On the question of possession the evidence was conflicting. There was sufficient however to support the verdict, and we are not at liberty to disturb it.

Let the judgment be affirmed. The other judges concur.

ELIZA FOSTER AND WILLIAM A. FOSTER, her husband, Appellants, *vs.* ROBERT KIMMONS AND NANCY HANNAH KIMMONS, Respondents.

1. *Equity—Contracts—Certainty—Specific performance.*—A Court of Equity will not decree the specific performance of a contract, unless it is established with reasonable certainty, having regard to its subject matter and to the circumstances under which, and with regard to which, it was entered into.

*Appeal from Greene Circuit Court.*

*James F. Hardin*, for Appellants.

I. Evidence can only be excluded for incompetence or irrelevance.

II. Where there is any evidence tending to prove the facts there must be a finding on the evidence. (The other points made are necessarily omitted not being considered by the court.)

*Nathan Bray*, for Respondents.

I. This contract being within the statute of frauds, every material fact in the petition in relation to the gift, and its terms, acceptance, and the possession, and improvements, under that gift must be proved so as to leave no room for reasonable doubt as to the facts relied on. (Johnson vs. Quarles, 46 Mo., 423; Baker vs. Vining, 30 Me., 121; Malin vs. Malin, 1 Wend., 625; Sewell vs. Baxter, 2 Md. Ch., 447; Hollida vs. Shoop, 4 Md., 465; Boyd vs. McLean, 1 Johns. Ch., 582; Enos vs. Hunter, 9 Ill., 211; 1 Sto. Eq. Jur., § 753.)

II. In such cases it is a proper practice to move to exclude the evidence and dismiss the bill.

III. There was no sufficient proof as to the identity of the land.

VORIES, Judge, delivered the opinion of the court.

This action was brought in the Lawrence Circuit Court, and afterwards moved to the Green Circuit Court by a change of the venue.

The action was brought to compel the specific performance of a parol gift of land, on the ground of part performance by

the delivery of possession and valuable improvements made on the land.

The action was originally brought by the plaintiff, Eliza Kimmons, who afterwards intermarried with William S. Foster, after which the suit was prosecuted in their joint names.

The petition charges, that the defendant, Robert Kimmons, the father of Edward Y. Kimmons, gave the said Edward certain lands, which were described in the petition by metes and bounds, lying and being in Lawrence County, State of Missouri; that by virtue, and in pursuance, of said gift the said Edward took and continued in the possession of said land until the 23d day of August, 1858, at which time he died; that after said gift and before the death of said Edward, he made permanent and lasting improvements on said lands by clearing and fencing portions of the land and erecting buildings thereon to the value of five or six hundred dollars; that during all of this time he claimed and used the land as his own with the knowledge and consent of his father, Robert Kimmons; that plaintiff, Eliza, was the wife of said Edward at the time of his death, and said defendant, Nancy H. Kimmons, was the only child and heir of the said Edward and is now six years old; that the plaintiff, Eliza, as the widow of said Edward, elected under the statute of this State to take a child's part of the real estate of the deceased in lieu of other dower therein; that, shortly after the death of the said Edward, the said Robert Kimmons forcibly took possession of the said lands and still holds the same, and fails and refuses to convey the legal title of said land to said Eliza and defendant, Nancy H. Kimmons; that the said Robert Kimmons is destroying the timber on said land; and prays for a decree compelling the said Robert to convey the land to said Eliza and Nancy H., and for general relief.

A guardian *ad litem* was appointed for the infant defendant, who filed an answer asking the protection of the court for the infant.

The defendant, Robert Kimmons, by his answer denied the gift of the land to his son as charged, or that he ever took

possession of the land in conformity to any supposed gift, or that said Edward made the improvements on the land as charged in the petition, but avers that the improvements on the land were made by said defendant, and that said Edward occupied the land by the permission of the defendant, and that he so occupied the land and worked the same for his own use as a compensation for work done by him in improving the same. The defendant denies, that the said Edward ever claimed the land as his own. The defendant further stated in his answer, that, since the commencement of the suit, he had for a valuable consideration sold and conveyed the land to one Isaac West, and that West had sold and conveyed to one Oliver P. Johnson, who was then in possession of the land, &c.

On the hearing of the cause it was proved by one R. B. Nicholas (who was the father of the plaintiff Eliza), that he had been well acquainted with the defendant, Robert Kimmons, for twenty years; that Edward Y. Kimmons and his brother Wash Kimmons, two of the defendant's sons, had each married a daughter of witness; that Edward Y. had been twice married, and that defendant, Nancy H., was the only child of his first wife; that his last wife had no children; that in the year 1855, and perhaps before the commencement of that year, the said Edward went upon and took possession of the land in controversy; that the land was then unimproved, except a small school house situated thereon; that Edward first moved into this school house in 1855, and continued in the exclusive possession of the land up to the time of his death in July, 1858; that, while he was in possession of the land, he made improvements in clearing and fencing land and in building a house thereon, to the value of from six to seven hundred dollars; that, during the time that he occupied the land, he claimed it as his own; that the defendant, Robert Kimmons, resided in one mile of the land, was frequently on the land, and saw Edward improving the same; that Edward married a daughter of the witness in the first part of the year 1858; that after this, witness was riding

over the land in controversy with the defendant, Robert, when he told witness that he had given the land to his son, Edward Y., and pointed out to witness where he supposed one corner of the land was, and where he thought the line would run, near a tree to the other corner, and he remarked, that he had made a division of his land among his boys, that he had given the Chalybeate Spring tract to Edward (the land, on which Edward resided, was called the Chalybeate Spring tract); that, after he had given the land to Edward, he had moved on it, and worked hard in improving it, and that he must make him a deed to it, or something might happen to one of them and cause trouble; that the old man also stated, that the land given Edward was not as good for farming purposes as that given to his son Wash, (who had married another of witness' daughters) but that he thought the spring would make it equal in value; the witness further stated, that Robert Kimmons, in another conversation with witness at his own house, stated, that he gave Edward the land at the time he moved on it in 1855; that he had made the improvements, and that he intended to make him a deed; that, after the death of Edward, witness administered on his estate, after which he had another conversation with Robert Kimmons, when he said that, because witness had administered on the estate, he would not make a deed to the land.

It was also testified by this witness, that he, since the death of said Edward, had the land surveyed, that the survey was made by his direction so as to include the land shown him by the defendant as the land given to Edward, and which is the same described in the petition; that witness thought Edward made all the improvements on the land; that he had never seen defendant's negroes working there, nor any one except the hands employed by Edward.

There were several other witnesses, who testified that the defendant had told them during Edward's life-time, that he had given Edward the land, and that he would make him a deed. One of these witnesses stated, that he had applied to Edward to get some timber from the land, and that Edward

told him that the land belonged to his father, that he was only living on it to improve the land, and was to get what he could make off of the land for the improvements made. Another witness testified, that he had purchased some timber on the land from the defendant, and that he afterwards applied to him to get more timber, when he told him that he had given the land to his son Edward, and that he grumbled when he let persons have timber from the land; that witness must go to Edward. The same witness testified, that Edward had told him that the land in the bottom belonged to his father.

The plaintiff, Eliza, testified, that the defendant was at the house of Edward about one week before his death, when he told Edward that he had given him the land, and that he had done a great deal of work thereon, and, that the first time he could make it convenient, to come up to his house and he would make him a deed. It was also shown, that while Edward lived on the land, the defendant's negroes had been seen there clearing and fencing the land, which was afterward put in cultivation. It was also shown in evidence, that the said Eliza had elected to take a child's part of the property left by her husband in lieu of other dower.

The defendant offered no evidence.

At the close of the evidence on the part of the plaintiffs, the defendant, Robert Kimmons, moved the court to exclude from its consideration all of the evidence offered on the part of the plaintiffs, for the reason that said evidence failed to show with certainty for what specific land the alleged contract was made, and that the evidence failed to show that the improvements made were made under the faith and belief that the contract would be performed, and that the evidence discloses merely an executory gift with acts yet to be performed by the donor, and that no adequate consideration was shown.

This motion was sustained by the court, and the petition dismissed, and final judgment rendered in favor of the defendant. The plaintiffs at the time excepted to the ruling of the court, and filed a motion for a new trial, setting forth as grounds therefor the rulings of the court excepted to. This motion

being overruled, plaintiff again excepted and appealed to this court.

The practice adopted by the court below, by which this case was decided, is an unusual one. After the conclusion of the evidence on the part of the plaintiffs, the defendant moved the court to exclude from the consideration of the court all of the evidence in the cause for several reasons stated in the motion, from which it was insisted, that the contract as made out by the evidence could not be specifically performed by the court. The court sustained the motion, and dismissed the plaintiff's petition. This course was certainly unusual in practice, but, I suppose, the effect was the same as if the cause had been submitted on petition, answer and evidence, and the petition dismissed on the ground that the evidence was not sufficient to authorize or justify the court in rendering any decree in favor of the plaintiffs. The case will be considered with that view.

The plaintiffs, by their petition, ask for the interference of the court to compel the specific performance of a contract. The contract charged to have been made is a verbal gift of the land named in the petition, coupled with a delivery of possession of the land, and the making of valuable and permanent improvements thereon by the donee,which, it is insisted, takes the case out of the operation of the statute requiring contracts affecting the title to land to be in writing.

The jurisdiction of courts of equity over actions of this nature, and to decree a specific performance of verbal contracts concerning real estate under certain circumstances, has been exercised so long, both in England and in this country, that it is no longer to be questioned; but, as a general rule, in order to the exercise of such jurisdiction, it must be made to appear, that the contract to be performed is certain and fair in all its parts, is for an adequate consideration, and is capable of being performed, and, where the contract is not in writing, possession must have been delivered and taken in pursuance of the contract, and improvements made, or other acts done, in part performance, by which it is rendered impos-

sible or inequitable to place the parties in *statu quo;* or to deny a specific performance would operate as a fraud on the other party, or in some cases where the contract is admitted by the answer. (2 Sto. Eq., §§ 751, 755, 759, and authorities there cited.)

Mr. Fry, in his work on Specific Performance, says: "It will be obvious, that an amount of certainty will be required in the specific performance of a contract in equity greater than that demanded in an action for damages at law. For, to sustain the latter proceeding, the proposition required is the negative one, that the defendant has not performed the contract, a conclusion which may be often arrived at without any exact consideration of the terms of the contract; whilst in equity it must appear, not only that the contract has not been performed, but what is the contract which is to be performed. It is, perhaps, impossible to lay down any general rule as to what is sufficient certainty in a contract; but it may be safely stated, that the certainty required must be a reasonable one, having regard to the subject matter of the contract and the circumstances, under which, and with regard to which, it was entered into. (Fry, Specif. Perform. [2 Am. Ed.], side page 102, *et seq.*)

In the case under consideration, the evidence shows, that the contract, which is asked to be specifically performed, was a gift of a piece of land, upon which is situate a celebrated spring; that the defendant, or donor, had a larger tract of land at and constituting the spring tract; it is not pretended that the whole tract of land was included in the gift; no mention is made in the evidence of the quantity of the land given, either by referring to its legal sub-divisions, or otherwise. The only evidence, tending in that direction, is, that the defendant, while riding over the land, had pointed out to the witness a tree at a considerable distance, which he supposed was near where one corner of the land would be, and he had also stated the course which he supposed one line of the land would run. This is the only description given, while the evidence clearly shows, that the son, to whom the land is charged to have been

given, did not claim the whole of the spring tract. It is impossible, therefore, to ascertain from any contract or gift proven what part, or how much, of the tract was given or intended to be given; the only evidence being, that one line of the land was supposed to be near a certain tree, without anything to indicate the number of acres given, or where the other lines were, or were supposed to be. It must at once be perceived, that it would be impossible for a court of equity to specifically perform the contract, and know the very contract made, or intended by the parties, was being performed as to the quantity and boundaries of the land. The court would have to first make the contract, and then perform it. This a court of equity can never do. It follows, that the plaintiffs' petition was, for this reason, properly dismissed.

It is not requisite, that we should pass on any other points made in the argument of the case in the briefs filed by the parties as to the mutuality of the contract and the sufficiency of the consideration, as no sufficient contract has been shown.

The other judges concurring, the judgment is affirmed.

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JOHN COSGROVE, Respondent, *vs.* THE TEBO AND NEOSHO RAILROAD CO., Appellant.

1. *Corporations—Notices to—How served.*—Notices can be served on corporations only in the mode pointed out by statute.
2. *Railroads—Claim for wages due from contractors—Notices—Statute, construction of.*—A notice to a railroad, that a contractor on their road is in arrears to his hands, which substantially complies with the statute (Wagn. Stat., 302, § 10), so as to prevent any misapprehension, is sufficient.
3. *Railroads—Contractors—Accounts of laborers—Admissions.*—The account of a laborer for work on a railroad under a contractor, signed by the contractor, is not evidence against the railroad company as its admission, unless the authority to make such admissions is established.

*Appeal from Cooper Circuit Court.*

*Hayden & Tompkins*, for Appellant.

I. If Donnelly was the agent of the defendant to sign the accounts sued on, the plaintiff was bound to prove the fact of agency, before he could offer to read the accounts in evidence.

II. The statute concerning the notice to the defendant must be strictly construed. (Peters vs. Iron M. R. R., 23 Mo., 107; Schulenburg vs. Bascom, 38 Mo., 188; Thomas vs. Barber, 10 Md., 380.)

III. The notices read in evidence did not comply with the statute and should have been rejected.

*Draffen & Cosgrove*, for Respondent.

I. The notices given by the laborer were sufficient. They put the appellant in full possession of the facts, and complied with the law in form and substance. (Putnam vs. Ross, 46 Mo., 337; Boylan vs. St. Boat Victory, 40 Mo., 244, and cases cited.)

II. Evidence, which was competent to establish the liability of Donnelly, the sub-contractor, was competent to prove the liability of the appellant. (Peters vs. St. Louis & Iron M. R. R. Co., 23 Mo., 107; Kent vs. N. Y. C. R. R. Co., 12 N. Y., 628.)

Sherwood, Judge, delivered the opinion of the court.

The plaintiff brought his action in the Cooper Circuit Court against the defendant to recover certain sums, alleged to be due him as the assignee of divers accounts, alleged to have been transferred to him by those, who had worked in the capacity of laborers in the construction of the road of defendant. The petition, which contains numerous counts, a separate count being devoted to each account thus, as alleged, assigned, states among other things, that Henry McPherson was the contractor with the defendant for the construction of a certain portion of defendant's road; that McPherson, after thus becoming contractor, assigned all of his interest in his contract to McPherson & Barnes; that McPherson & Barnes, after thus becoming contractors with defendant for such construction, contracted with one M. Donnelly for the

construction of that portion of said road known as section 14 in Cooper county; that the following named persons worked, as laborers on said last named portion of said road, for said Donnelly, contractor, as aforesaid, under said McPherson & Barnes, &c., &c.

The petition also alleged the giving of notices to defendant in each case by service of the same on Fleming, defendant's engineer, and the assignment of the different claims sued on to plaintiff, prior to institution of suit, &c.

The answer of defendant was a general denial. It did not, however, deny, that Henry McPherson was a contractor, as alleged in the petition, nor that he assigned his interest in the contract to McPherson & Barnes, nor that the latter became contractor with the defendant in the room and stead of McPherson.

The accounts alleged to have been assigned to plaintiff were in this form:

To N. R. R. Section 14, Sept. 16th, 1870.

Due Thomas Sullivan nineteen dollars and twenty-five cents ($19.25,) for work done in the month of September, payable October 15th, 1870.

M. Donnelly.

Donnelly's name is also sometimes signed as contractor, and occasionally sub-contractor.

The notices, referred to in the petition, were in this form:

To the Tebo & Neosho Railroad Company:

Take notice, that I have worked for McPherson & Barnes, under M. Donnelly, sub-contractor of said McPherson & Barnes, on section 14 of the Tebo & Neosho R. R. in the county of Cooper, between the 15th day of August, and the 15th day of September, 1870, ten and a half days, at $2.00 per day. That the same amounts to twenty-one dollars; which amount is wholly unpaid, and I shall look to you for the payment thereof.

Yours, &c.

October 4th, 1870.

John Stephens.

By John Cosgrove, his Attorney.

Evidence was adduced at the trial tending to prove, that, of the accounts sued on, some were signed by Donnelly, and others by his authority; that he worked on the road as sub-contractor, or under McPherson & Barnes; that McPherson himself made the contract with Donnelly, and that it was not made with the latter by McPherson and Barnes; that the work was done on the road of defendant by the laborers, who had assigned their accounts to plaintiff, as averred in the petition, and that such laborers had performed said work under Donnelly. The notices, alleged in the petition to have been served on defendant's engineer, and the accounts signed by Donnelly, were also read in evidence, as well as a certain record entry in the case of McPherson & Barnes against defendant showing, that the latter had stricken out of its answer in that cause a counter-claim alleging the pendency of two suits of plaintiff against defendant; that the counter-claim was not to be litigated, and was to be withdrawn without prejudice by consent, &c.

The plaintiff also testified, that "he gave the several notices attached to the original petition to defendant."

This was in brief the evidence offered, and the defendant duly saved its exceptions as the cause progressed.

It was clearly erroneous to admit as evidence against the defendant the accounts signed by Donnelly. Whatever of binding force and effect they could have as the admissions of the latter, certainly they could not so operate as to charge the defendant, until some agency on Donnelly's part to make such admissions was established.

For like reason an instruction on behalf of plaintiff, altogether ignoring the question of agency, and asserting the admissibility of the accounts they signed to establish as against the defendant the amount and value of the labor specified in such accounts, was unquestionably wrong.

The notices, alleged to have been served upon defendant, were in substantial compliance with the statute. (Wagn. Stat., 302, § 10.) The evident object of such notices is to apprize the company, that the person, whom they have employed in the

construction of their road, is in arrears to his hands, and to cause the amount of such indebtedness to be withheld from the contractor until such claims are satisfied, and the company thus exonerated. Any notice therefore, which gives the company information sufficient to prevent any real misapprehension on any of the points specified in the statute, must be regarded as a practical compliance therewith. But the notices in this case ought not to have been admitted in evidence, for there was nothing to show, that they had ever been served; and the plaintiff's testimony certainly had no tendency to supply any lack in this particular. It is true he testifies to giving the notices to the defendant, but how, when, and where? The only mode, by which corporations may be notified, is in this way pointed out by the statute itself. For these artificial entities have no eyes to see, ears to hear, nor hands to receive, and can only directly act, or be acted upon, through and by means of their agents and officers. The bill of exceptions is made out after such a poor fashion, that I have been unable to determine, whether the court, under the circumstances of the case and admissions made in defendant's answer, committed any material error respecting the contract between McPherson & Donnelly; and for the same cause it is impossible to say, whether or not the record entry in the case of McPherson & Barnes against defendant was admissible; as the counter-claim in the entry referred to, neither in form nor in substance, accompanies the entry. I may however remark, that such entries are frequently received as solemn admissions of the existence or non-existence of certain facts, even in favor of a stranger to the action in which the entry occurs, and against one of the parties to the suit then pending. (1 Greenl. Evid., § 527, and cases cited.)

Judgment reversed and cause remanded. Judge Adams did not sit; the other judges concur.

MARGARETTA A. SCHNEIDER, *et al.*, Plaintiffs in Error, *vs.* M. KOESTER, Defendant in Error.

1. *Wills—Son not mentioned—Subsequent death—Son's widow—Vested estate—Statute, construction of.*—A. died, leaving a will wherein he neither mentioned nor provided for his son B. B. subsequently died, leaving a widow. *Held*, that A. died intestate as to B. (Wagn. Stat., 1365, § 9), and that the right and title of B. in the estate of A. became a vested interest on the death of A., and, upon B.'s death passed to his representatives.
2. *Wills—Intestacy as to a child—Share, how obtained—Practice, civil.*—When a testator fails to mention or provide for one of his children in his will, the will is not invalid, and a suit to have the will set aside is not the proper remedy, but the testator dies intestate as to such child, and, if necessary, he can resort to § 47 of the chapter concerning Wills. (Wagn. Stat., 1370.)

*Error to Cole Circuit Court.*

*G. W. Miller*, for Plaintiffs in Error.

*Ewing & Smith*, for Defendant in Error.

I. The plaintiffs cannot maintain this action. They are not a "child or children" within the meaning of the law. (Wagn. Stat., 1365, § 9.)

NAPTON, Judge, delivered the opinion of the court.

This was a proceeding in the Circuit Court to set aside the will of B. J. Koester, on the ground that the plaintiff's husband, who was a son of said testator, was not named or provided for in said will. The facts alleged, and not denied, are, that Koester left a son surviving him, who married the plaintiff; but the son died, and the plaintiff afterwards married the co-plaintiff, Schneider. The defendant denied the right of plaintiffs to sue under the 9th section of the act concerning Wills, which provides, that "if any person make his last will and die, leaving a child or children, or descendants of such child or children (in case of their death), not named or provided for in such will, although born after the making of such will, or the death of the testator, every such testator, so far as shall regard any such child or children or their descendants not provided for, shall be deemed to die intestate; and such child or children, or their descendants, shall be entitled to such proportion of the estate of the testator, real and per

sonal, as if he had died intestate, and the same shall be assigned to them; and all the other heirs, devisees and legatees shall refund their proportional part."

Section 10 provides, that if said child or children shall have received from the testator in his life-time, by way of advancement, an equal proportion of the testator's estate, they shall take nothing in virtue of the preceding section.

The defendant claimed, and so the court held, that as she was not a child, or a descendant of a child of the testator, she acquired no right under this 9th section. The defendant also set up, that the son had been advanced his full share of the testator's estate by the father in his life-time. There was no replication and no evidence, and the court gave judgment for defendant.

The construction placed upon the statute by the court is manifestly erroneous. Upon the death of the testator, the right and title of the son became a vested interest in the son, which upon his death passed to his representatives.

This proceeding, however, is obviously based upon a misconception. The facts stated constitute no ground whatever for setting aside the will under the 27th section of the statute The will is not rendered invalid by reason of an omission of the testator to mention one or more of his children; such omission only produces an intestacy as to the interest of the omitted child, and such pretermitted child, or the descendants of such child, may proceed in the mode to recover their interests in the realty and personalty specified in the 47th section of the act.

In this case, the son's death required the appointment of an administrator to represent the interests of the plaintiff, and of creditors, if any there were. (Levin vs. Stephens, 7 Mo., 90.)

However, if the son had received his share before the death of his father, he had no interest, which could pass to his heirs, who, in this case, would be the mother, and his wife by virtue of her statutory right to one-half of her husband's estate when he dies intestate and without children.

As the proceeding in this case to set aside the will was not the proper one to establish the rights claimed, the judgment of the Circuit Court must be affirmed.

The other Judges concur; Judges Wagner and Sherwood absent.

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FREDERICK ZEILER, Defendant in Error, *vs.* MOSES CHAPMAN, Plaintiff in Error.

1. *Elections—Registered voters, rejection of—Practice, civil—Trials—Evidence.*—The judges of an election have the right under the law to reject registered voters, and in a contest for an elective office the presumption is, that such voters were rightly rejected, unless the contrary is shown by the party claiming such rejection to have been illegal and improper.
2. *Elections—Non-registered voters—Count.*—The votes of persons not registered cannot be counted at an election.
3. *Elections, validity of—Registering officers—Failure to register the voters.*—Where prior to an election the registering officers fail to register the voters as required by law, the election subsequently held is void.

*Error to Lafayette Circuit Court.*

*Wallace & Mitchell*, for Plaintiff in Error.

I. It was not the intention of the constitution, that the right of suffrage of the citizen should be left to the whims and caprices of registration officers. There would not be time, by any of the writs known to the law, to compel a supervisor of registration to perform his duty of filling vacancies within the time limited for registration under the law.

II. Voters, who have had no opportunity to register, have a right to vote by taking the oath at the polls at the time of offering to vote. (Const., Art. 2, § 5.)

III. The taking and subscribing of the oath of loyalty is at least *prima facie* evidence of the right of the person to be registered as a qualified voter and of his right to vote, and such right can only be impaired or destroyed by proof disproving the existence of the right. (Const., Art. 2, § 5.)

IV. It was intended to leave the question of counting the

votes marked as rejected open to be decided on the contest of an election, and, in the absence of evidence to the contrary at the trial, they must be counted. (Const., Art. 2, § 5.)

*Johnson & Botsford*, for Defendant in Error.

I. The fact, that there was a partial or total failure to register the voters in Dover Township, would not authorize them to vote without being registered. (Ensworth vs. Albin, 46 Mo., 450.)

Napton, Judge, delivered the opinion of the court.

This is a case of a contested election for the office of Treasurer of Lafayette County in Nov. 1867. The case was originally tried in the County Court, where the contestee, Chapman, was decided to have been duly elected; and afterwards removed to the Circuit Court, where a trial *de novo* was had, which resulted in a decision and judgment in favor of the contestant Zeiler.

The facts appear to be as developed at the trial, that Chapman, the contestee, received a majority of the votes cast in the county, and upon the returns was declared elected, and duly commissioned as Treasurer; but the returns included one hundred and thirty-nine votes cast for him in Dover precinct, whereas the registration books at that precinct only showed about thirty voters who were registered. Excluding the non-registered voters at the precinct, Chapman did not have a majority of votes, unless two hundred and ninety-one voters, who were returned as "rejected voters," and who voted for Chapman, were to be counted. There was no evidence on either side in regard to the qualifications of the two hundred and ninety-one rejected voters, the contestant relying on the fact that the judges of election had reported them as rejected voters, and the contestee insisting that, as they had taken the oath of loyalty and were duly registered, *prima facie* they were entitled to vote.

To obviate the objection to receiving the one hundred and thirty-nine votes at Dover, the contestee, Chapman, proved, or offered to prove that the registration officer never was at

Dover but on one Saturday before the election, or before the fifteen days anterior to the election, that he then registered about thirty voters, and immediately resigned; that application was made to the supervisor of registration by the citizens of that precinct in the form required by law to have some one else appointed; but the application was refused, and no officer was appointed, and consequently no registration was completed in that district or precinct; that the citizens attended at the place of registration for the purpose of registering, but, as no officer was there, they could not register; that therefore on the election day they went to the polls, took the oath of loyalty, and voted. All this evidence was excluded by the court.

And the court determined, that, as the voters at Dover were not registered, their votes must be rejected. And the court further held, that, as to the rejected voters, they were not to be counted. Various instructions were asked as to the constitutionality of the oath of loyalty required by the constitution of 1865, but we have been unable to see how the question was presented by any facts in the case. The two hundred and ninety-one rejected voters had all taken the oath of loyalty prior to registration, and the voters at the Dover precinct had done the same thing, and the court might have given all the instructions asked on this point or refused them, and still decided, as was done, in favor of the contestant. It does not appear, that any vote was rejected on this account. The instructions were therefore mere abstractions, and, now that this part of the constitution is abolished, any opinion on this point would be of no practical importance.

The only questions presented by the record are, first, whether the persons marked as rejected voters made a *prima facie* case for the contestant or contestee as to their right to vote? The court decided, that having been thus marked, it devolved on the contestee to show that they were qualified voters. No evidence on either side was offered. We think the decision of the court was right on this point, although the voters had taken the oath of loyalty, and had been duly registered. The

judges of the election had still a right under the law to reject them, and if they were improperly rejected that should have been shown by the party claiming an improper and illegal rejection. As there was no evidence on this point either way, the presumption remained that they were properly rejected.

The second question presented is as to the result of the election in Dover Township or precinct. There the supervisor of registration refused to perform the duties imposed upon him by law. We adhere to the decisions of this court heretofore made on this registration law, that no votes can be counted where they have not been registered; and therefore the Circuit Court decided correctly, that the contestee was not elected, because his majority was the result of counting non-registered votes The act is peremptory on this subject, and requires registration before voting. But we do not concede, that registration officers can defeat the will of the people by absenting themselves from the place of registration or resigning. If this can be done, elections are a farce dependent entirely on the officers selected to carry out the law. They may decline registration in a precinct, which they know to be hostile to their views, and thus defeat the votes of all the qualified voters at said precinct. This is not the object or intent of the registration law. We assume that a *bona fide* registration was designed, and every facility is afforded to attain this object.

Whilst, therefore,we hold with the Circuit Court, that non-registered votes could not be counted, we also hold, that the refusal to comply with the law on the part of the officers of registration rendered the election void, and that the contestor in this case was not elected. As the contestee in this case received the certificate of election and was commissioned, *prima facie* he was entitled to the office. A proceeding on the part of the State might have been instituted to oust him. There was really no election, as the officers appointed to supervise the registration failed or refused to perform their duty. It was never intended we presume to place it in the power of the registering officers to defeat the will of the electors by re-

fusing or failing to perform the duties imposed on them by law. This would be an outrage on the principle of popular election which the law concedes. The only effect of no registrations in a case such as this, where no registration is possible, is to render the election a nullity. The Circuit Court refused to count the votes which were not registered, and in this we think the Circuit Court was right, but this did not give the contestant the office, when it was shown, that the non-registered voters had no power of registering by reason of the failure on the part of the registering officers. To hold otherwise would be to submit the result of all elections to the officers of registration, who could attend at such precincts as they pleased, and refuse to attend to such as they thought unfavorable to their views, and a small minority of the electors could in this way elect. This was not the intent of the law, and although non-registered voters cannot be counted, we think the election is void where the registration officer fails to perform his duty. The case of West vs. Ross, 53 Mo., 350, involved the effect of omissions of the judges at the election, and the point now decided was not made or decided.

The judgment is therefore reversed. The other judges concur.

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FREDERICK MERCIER, PETER MERCIER AND ALFRED T. PEDIGO, Plaintiffs in Error, *vs.* THE MISSOURI RIVER, FORT SCOTT AND GULF RAILROAD COMPANY, Defendant in Error.

1. *Land and land-titles—Conveyances—Heirs.*—A conveyance of land to a grantee and his heirs creates a fee simple title, both at law and in equity.

*Error to Jackson Circuit Court.*

*Gage & Ladd, and Cobb & Cook*, for Plaintiffs in Error.

I. By the deed the premises are conveyed to William Gillis as trustee of Maria Louisa Mercier and her family. The words "her family" in this deed mean the same as "her children

then born, and thereafter to be born of her said marriage with said Prosper Mercier." The word "family" means "children." (Terry's Will, 19 Beav., 580; Barnes vs. Patch, 8 Ves. 604; Woods vs. Woods, 1 Mylne & Cr., 401; McLeroth vs. Bacon, 5 Ves., 159; Whiting vs. Whiting, 4 Gray, 236; White's Exrs. vs. White, 30 Vt., 338; Flournoy vs. Johnson, 7 B. Mon., 693; Cosby vs. Furguson, 3 J. J., Marsh, 264.) The word "heirs" in the order of the court also means the same as the word family. This is not the usual legal meaning of the word but it may have this meaning. (2 Washb., Real Prop., [3 Ed.] 274; Thurston vs. Thurston, 6 R. I., 296; Williamson vs. Williamson, 18 B. Mon., 329; Rutty vs. Tyler, 3 Day, 470.) It must be so construed in this case, because that construction is necessary to carry out and not defeat the obvious intent of the deed, the order and the entire proceeding, which was to protect the estate from the husband. It is believed that no case can be found in which a deed is so construed as to defeat the rights of parties recited in the deed itself, where another construction, by which those rights might have been saved and protected, was possible.

II. Mrs. Mercier properly claimed her "Equity," and the court decreed it to her, and thereby, the children acquired a vested interest in it. (Lloyd vs. Williams, 1 Madd., 244; Murray vs. Elibank, 13 Ves., 1; Lloyd vs. Mason, 5 Hare, 148; Suggitt's Trusts, 3 Ch. App. [Law Rep.], 215; Kenny vs. Udall, 5 John. Ch., 464; 3 Cow., 590; Mumford vs. Murray, 1 Paige, 620; Steinmetz vs. Halthin, 1 Glyn. & Jam. 64; Haviland vs. Myers 6 John. Ch., 25; Helms vs. Franciscus, 2 Bland. Ch., 544; Greer's Heirs vs. Boone, 5 B. Mon., 554; Perry Trusts, §§ 627,–638; Sto. Eq. Jur., §§ 1402–1420; Hill Trustees, [4 Am. Ed.] 408-414.)

III. Under the circumstances the true interpretation of the deed is a life estate to the mother with remainder to the children. (Armstrong vs. Armstrong, 7 Eq. Cases, [Law Rep.] 518; Jeffrey vs. DeVitre, 24 Beav., 296; Froggatt vs. Wardell, 3 DeG. & S., 685; White vs. Williamson, 2 Grant, Cas. 249; Carr vs. Estill 16 B. Mon., 309.)

*W. P. Hall and Karnes & Ess*, for Defendant in Error.

I. It is evident from an examination of the petition, the decree, and the deed, that the trustee held this property for the wife as her sole and separate property, and that her children had no interest therein.

II. No court can construe the word "heirs" to mean "family" or "children," for the word "heirs" is a legal term, and here is used in a decree by a court supposed to know the legal meaning of the law terms it uses in its records.

III. "The *cestui que trust* has *jus disponendi*, that is, may call upon the trustees to execute conveyances of the estate as the *cestui que trusts* direct." (Lewin Trusts, [2 Am. Ed.] 595; Perry Trusts, 466; Watts vs. Turner, 1 Russ. and Myl., 634; Moore vs. Burnet, 11 Ohio, 334; Arrington vs. Cherry, 10 Ga., 429; Angier vs. Stannard, 3 Myl. and K., 556; 1 Sanders Uses and Trusts, [2 Am. Ed.] 2; 2 Washb. Real Prop., [Ed. 1862] 209, 210; Hill Trustees [Am. Ed., 1857], 278-409.)

IV. The sale by her trustee, though ordered by the court, was made at Mrs. Mercier's instance and request, and the purchaser paid the money to Gillis, acting as such trustee, and selling by the consent and direction of Mrs. Mercier, and, as against such a purchaser, Mrs. Mercier can have no relief, and her heirs take no rights of property except what she had at her death.

V. Even if the court had no jurisdiction, Mrs. M., taking advantage of the proceedings, cannot take the objections, nor can her heirs. (Dulin vs. Howard, 66 N. C., 433.)

VI. As to separate property, married women are in all respects to be deemed sole, and can convey. (Lechmere vs. Brotheridge, 32 Beav., 353; Whitesides vs. Cannon, 23 Mo., 457; Tiernan vs. Pool, 1 Gill. and J., 216; Yale vs. Dederer, 21 Barb., 286; Coates vs. Robinson, 10 Mo., 757; Kimm vs. Weippert, 46 Mo., 532.)

Adams, Judge, delivered the opinion of the court.

This was an action of ejectment. Both parties claimed title under the following deed:

This indenture, made and entered into this 15th day of March, in the year of our Lord one thousand eight hundred and fifty, by and between Benoist Troost, Mary Ann, his wife, of the county of Jackson, and State of Missouri, of the first part, and William Gillis, as trustee for the use and benefit of Maria Louisa Mercier and her family, according to a decree made at the September term, 1847, of the Circuit Court of the county aforesaid, of the second part, witnesseth:

That the said parties of the first part, for and in consideration of the sum of two hundred and fifty dollars to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained and sold, and by these presents do grant, bargain, sell and confirm unto the said William Gillis, in trust as aforesaid, according to the decree aforesaid, and to his successors, the following tract or parcel of land situate and being in the county of Jackson, and State of Missouri, together with all and singular the appurtenances thereunto belonging, to-wit: the one-half of the northwest fractional quarter of section No. seven (7), in township No. forty-nine (49), in range No. thirty-three (33), excepting about ten acres heretofore conveyed to Silas Armstrong, supposed to contain one hundred and forty acres, be the same more or less, the one undivided half, which in division shall be so divided, that each half shall contain one-half of the bottom and one-half of the hill land in quantity, the said party of the second part having, for his part in trust as aforesaid, the northeast part thereof, situated east of Turkey Creek, in the county and State aforesaid.

To have and to hold the above granted premises to the said party of the second part in trust as aforesaid, according to the decree as aforesaid, and to his successor or successors forever.

And the said parties of the first part for themselves, their heirs, executors, administrators and assigns, do covenant with the said party of the second part and his successors in trust, as aforesaid, to forever warrant and defend the title to the afore-granted premises against the claim or claims of all persons whomsoever.

In testimony whereof, the said parties of the first part have hereunto set their hands and affixed their seals, the day and year first above written.

BENOIST TROOST, [L. S.]
MARY A. TROOST, [L. S.]

Interlineations and erasures made before signing.

Be it remembered, that on the eighteenth day of March, in the year of our Lord one thousand eight hundred and fifty, personally came Benoist Troost and Mary Ann, his wife, before me, Lott Coffman, a justice of the peace within and for the township of Kaw, and county of Jackson, who are personally known to me to be the same persons whose names are subscribed to the foregoing deed as a party thereto, and the said Benoist Troost then and there acknowledged that he executed said deed voluntarily for the uses and purposes therein expressed. And the said Mary Ann Troost having been made acquainted with the contents of said deed, and on examination separate and apart from her said husband, acknowledged that she executed said deed for the uses and purposes therein expressed, freely, and without compulsion or undue influence of her said husband.

In witness whereof I have hereunto set my hand and seal this 18th day of March, A. D. 1850.

LOTT COFFMAN, J. P.

STATE OF MISSOURI, Jackson county. } ss.

I, Sam. D. Lucas, clerk of the Circuit Court within and for the county aforesaid, do certify that the foregoing deed from Benoist Troost and wife to William Gillis, trustee for the use and benefit of Maria Louisa Mercier and family, together with the acknowledgment, was deposited and duly recorded in my office on this 21st day of September, A. D. 1850, in book P. folio 545, and following.

In testimony whereof I hereunto set my hand and affix the seal of said court, at office in Independence, this 21st day of September, A. D. 1850.

[L. S.]

SAM D. LUCAS, Clerk.
By JAS. A. RICE, D. C.

The decree of the Jackson Circuit Court referred to in the foregoing deed reads as follows:

MARIA LOUISE MERCIER, BY HER NEXT FRIEND, BENOIST TROOST.

On petition to vest trust funds in real estate

Now at this day comes the said petitioner, by her solicitor, and files her petition herein, praying the court to make an order on William Gillis, trustee of certain funds in his hands belonging to her, and authorizing and requiring said trustee to vest a certain portion of said funds in land for a home for the said petitioner, Maria Louise Mercier, and her family, which said petition being by the court heard and fully understood, and it being manifest to the court that it would induce greatly to the comfort and happiness of the said petitioner, Maria Louisa Mercier, and her family, to vest a portion of said trust funds in land for a home for the said petitioner and her family; it is, therefore, ordered, adjudged and decreed, by the court here, that William Gillis, trustee of the funds of the said Maria Louisa Mercier, be, and he is hereby, authorized and required to vest the sum of three hundred dollars, of the funds in his hands belonging to the said petitioner, in land for a home for the said petitioner and her family, and the court doth hereby appoint William Gillis Commissioner to hold said land in trust for the said Maria Louisa Mercier and her heirs, and orders that the deed of conveyance for said land, so ordered to be purchased as aforesaid, be made to the said William Gillis, commissioner for the said Maria Louisa Mercier and her heirs, and it is further ordered, that said commissioner report his proceedings in the premises to the next term of this court, and this cause is continued.

The plaintiffs are the children and heirs at law of the said Maria Louisa Mercier, who departed this life before the commencement of this suit. They, however, do not claim as her heirs at law, but by way of remainder in fee under the foregoing deed to commence at her death. The defendant claims as a purchaser by mesne conveyance from the trustee Gillis, who sold the land in dispute in fee at the request of Maria Louisa Mercier. The Circuit Court rendered judgment for the defendant.

1. It is manifest from this record, that the rights of these parties depend upon the proper construction of the trusts declared in the deed from Troost and wife to Gillis, as trustee for Mrs. Mercier. The decree of the Jackson Circuit Court of September, 1847, is referred to by this deed as declaring the trust upon which Gillis was to hold the land; and the deed must be construed just as though this decree was copied into it. The reference makes the decree a part of the deed.

The operative words of the decree declaring the trusts are, "The court doth hereby appoint Wm. Gillis commissioner to hold said land in trust for the said Maria Louisa Mercier and her heirs, and orders that the deed of conveyance for said land, so ordered to be purchased as aforesaid, be made to said Wm. Gillis, commissioner, for said Maria Louisa Mercier and her heirs."

At common law a conveyance of lands to a grantee and his heirs creates a fee simple title. The same rule prevails in equity in regard to trusts. There is nothing in the deed to Gillis limiting the trust estate to Mrs. Mercier for life.

The plain language of the decree, which forms a part of the deed and declares the trusts, created a fee simple equitable estate in her; and the sale and conveyance made by Gillis, as trustee, passed the whole title to his grantee.

The point raised and discussed here in regard to the validity of the decree of the Jackson Circuit Court need not be passed on by us. For whether the decree was valid or not, it was assumed to be so by all parties to the deed, and became a part of the deed, and as such it must be looked to as declaring the trusts.

In making the deed the parties might have used language of the same import without reference to the decree, and such language would have received the same construction. The decree, being incorporated into the deed as a part thereof, must necessarily be treated as the act of the parties, precisely the same as any other part of the deed. Troost, by incorporating the decree into this deed, as declaring the trusts, made it his own language for that purpose; and the trustee and

beneficiary in accepting the deed rendered the decree valid as a writing declaring the trust, whether it was valid as a judicial act or not, and the same thing may be said in regard to the decree of 1858, ordering the sale of the land. The beneficiary's consent to the sale without regard to the decree, and the deed of the trustee, were sufficient to pass the whole title.

Judgment affirmed; the other judges concur.

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JOHN E. RYLAND, Respondent, *vs.* JAMES B. CALLISON, MARTHA E. PURVIANCE and her husband GEORGE W. PURVIANCE, Appellants.

1. *Fraudulent conveyances—Resulting trusts—Sale on execution.*—When one makes a conveyance of his lands in order to hinder, delay and defraud his creditors, there is created thereby a resulting trust in favor of his creditors, and such property can be sold on an execution against him.
2. *Fraudulent conveyances—Equity—Proceedings to set aside—Purchaser at execution sale.*—A purchaser of B.'s land at execution sale will occupy as advantageous a position, as would a creditor of B., in proceedings to set aside a prior conveyance by B. of this land on account of fraud.

*Appeal from Lafayette Circuit Court.*

*Johnson & Botsford*, for Appellants.

I. Ryland was a purchaser at sheriff's sale, and not from the original grantor, and a purchaser to come within the meaning of the statute must purchase from the fraudulent grantor. (1 Sto. Eq. Jur., § 433 and n.; Kerr Fraud and Mist., 228, 229; Russell vs. Kearney, 27 Ga., 96; Bell vs. McCawley, 29 Ga., 355.

2. *Where a person makes a conveyance, which is valid between the parties, thereto, though fraudulent as to creditros, he has no interest in the land, either legal or equitable*, which can be sold under execution, until the creditor has proceeded in equity to set aside the fraudulent deed. (Bobb vs. Woodward, 50 Mo., 95; Harrington vs. Harrington, 27 Mo., 560; Dunnica vs. Coy, 28 Mo., 525; Rankin vs. Harper, 23 Mo.

579; Eddy vs. Baldwin, 23 Mo., 588; Howe vs. Waysman, 12 Mo., 169; Wagn. Stat., 605, § 16; Mellvaine vs. Smith, 42 Mo., 45; Brant vs. Robertson, 16 Mo., 129; Broadwell vs. Yantis, 10 Mo., 398.)

III. Such a sale is not void, but only voidable. It is good as between the parties, and operates to divest all interest from the grantor, and can only be set aside by a direct proceeding by a creditor. (Pearsoll vs. Chapin, 44 Pa. Stat., 9; Gutzwiller vs. Lackman, 23 Mo., 168.)

*Ryland & Son, with H. C. Wallace & Ryland*, for Respondent.

I. The purchaser at execution sale, though not a creditor of the execution debtor, can seek the aid of a court of chancery to set aside and annul the deed made by the execution debtor as fraudulent and void. (Pepper vs. Carter, 11 Mo., 540; Burk vs. Flournoy, 4 Mo., 116; Howe vs Waysman, 12 Mo., 169; Cason vs. Murray, 15 Mo., 378; Aspinall vs. Jones, 17 Mo., 209; McLaughlin vs. McLaughlin's Admr., 16 Mo., 242; Woodson vs. Pool, 19 Mo., 340; Franse vs. Owens, 25 Mo., 329; Rankin vs. Harper, 23 Mo., 579; Eddy vs. Baldwin, 23 Mo., 588; Johnson vs. Sullivan, 23 Mo., 474; Miles vs. Jones, 28 Mo., 87; Potter vs. McDowell, 31 Mo., 62; Peyton vs. Rose, 41 Mo., 257; Allen vs. Berry, 50 Mo., 90; Bobb vs. Woodward, 50 Mo., 95; Turner vs. Turner, 44 Mo., 535; Merry vs. Freeman, 44 Mo., 518; Dunnica vs. Coy, 24 Mo., 167; Herrington vs. Herrington, 27 Mo., 560; Potter vs. Stevens, 40 Mo., 229; Hildreth vs. Sands, 2 Johns. Ch., 35; 14 Johns., 493; 1 Am. Lead. Cas. [Hare & W's notes], 48; Anderson vs. Roberts, 18 Johns., 513; Bridge vs. Eggleston, 14 Mass., 245.)

Sherwood, Judge, delivered the opinion of the court.

John E. Ryland, plaintiff, became the purchaser at execution sale of certain lands once owned by defendant James B. Callison, but which had been conveyed by the latter to his sister-in-law. This suit is brought to set aside that conveyance on the ground that it was made to hinder, delay and defraud Callison's creditors; and the evidence adduced on the trial leaves

no room for doubt, that such was the intent which prompted the execution of the deed in question. The law is well settled in this State, that, where a debtor conveys his land with the fraudulent design above mentioned, a resulting trust is thereby created in favor of his creditors, and is the subject of execution sale. And it is equally well settled, that a purchaser at such sale will occupy as advantageous a position as though he were a creditor, when proceeding to set aside the debtor's conveyance on the ground of fraud.

This disposes of the only questions of practical importance in this case, and the result is, that the judgment must be affirmed.

All the judges concur.

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W. A. CURRY, Defendant in Error, vs. FRANK SCHMIDT, Plaintiff in Error.

1. *Conveyances—Real estate—Fixtures—Temporary removal.*—A conveyance of real estate carries with it the fixtures attached to the property and those which have been removed merely for a temporary purpose.
2. *Mortgages and deeds of trust—Fixtures, erection of—Sale—Whose property.*—If a mortgagor erects improvements on, or attaches fixtures to, the mortgaged premises, they become the property of the mortgagee for the payment of his debt; and if the property is sold under the mortgage or deed of trust they become the property of the purchaser.
3. *Mortgages and deeds of trust—Fire—Removal of fixtures—Sale.*—After certain real estate was conveyed by deed of trust, a fire occurred, which burned down the improvements, and some of the fixtures were removed. Afterwards the trustee sold the property under a deed of trust, describing it in his deed as in the deed to him. *Held*, that by such sale, no intention to the contrary appearing, the removed fixtures were not sold; that the trustee might have sold these fixtures as personal property, but had no right to sell them merely by selling the ruined premises.

*Error to Cole Circuit Court.*

*Ewards & Son, and Lay & Belch*, for Plaintiff in Error.

I. These fixtures had been severed from the building, and were no longer attached to it, when it was sold under the deed

of trust. The purchaser only bought what was in the building at the time of the sale, unless it was represented at the sale, and so understood by the purchaser, that these former fixtures should pass by the sale. There was no evidence to that effect. (Scott vs. Shy, 53 Mo., 478.)

*Ewing & Smith*, for Defendant in Error.

I. Where fixtures are detached from a building, to which they belonged as a constituent part thereof, for temporary purposes, they will pass under a general grant of the premises. These fixtures passed to Curry under the deeds from Schmidt to the trustee and the trustee to him, Curry. (3 Washb. Real Prop. [3d Ed.], 338; Farrar vs. Stackpole, 6 Me., 154; Shep. Touch., 90 · 2 Hil. Mort. [3d Ed.], 351, 352; Butler vs. Page, 7 Met., 40.)

Adams, Judge, delivered the opinion of the court.

This was an action of replevin for what had been fixtures in a hotel building in Jefferson City, Missouri, consumed by fire. The plaintiff claimed title to these fixtures, by virtue of a sale under a deed of trust existing on the lot and building at the time of the fire.

The deed of trust had been given more than a year before the fire occurred, and had been executed by the defendant to secure certain debts which he owed. The property was burnt on the first day of March, 1871; and during the progress of the fire, the fixtures in dispute were removed from the building and carried to another lot, and held by the defendant in his possession till the commencement of this suit.

In April, 1871, the trustee sold the real estate with the ruins as they stood on the premises, and the plaintiff purchased the same, and took a deed therefor from the trustees, describing the property bought as it had been described in the deed of trust; and under this deed he claimed title to the fixtures which had been removed during the fire. The proceeds of the sale under the trust deed paid the debts and left a surplus, which was paid over to the defendant. The only question, raised by the record and discussed here, is, whether the sale of the

property in its ruined condition carried with it the fixtures in dispute. The Circuit Court refused instructions, asked by the defendant, raising this question, and decided for the plaintiff.

There can be no question at all about the general proposition, that the conveyance of real estate conveys with it all the fixtures that are attached to the property, or which may have been removed merely for a temporary purpose. (3d Washb. Real Prop., 338.)

So if a mortgagor erects improvements or attaches fixtures to the mortgaged premises, they become the property of the mortgagee for the payment of his debt. (Butler vs. Page, 7 Met., 40.) And, if at the time of a sale under a deed of trust, the fixtures are attached, they pass by the sale, and, if removed after the sale and before a deed is made, replevin will lie by the purchasee. (Sands vs. Pfeiffer, 10 Cal., 258; Cohen vs. Kyler, 27 Mo., 122.)

The question here is not, whether the trustee, or beneficiaries in the trust, could have reached the fixtures thus detached, if necessary for the payment of the debts; but whether the title to the fixtures passed simply by a sale of the ruined premises.

There is nothing in the case to show that such was the intention of the parties. In my judgment, the trustee could have sold the fixtures as personal property; but he had no right to sell them merely by selling the ruined premises.

In the condition that the premises were in, and as they stood upon the ground when sold, those fixtures formed no part of the realty. Under this view the court erred in refusing the defendant's instructions, and also in rejecting testimony raising the same questions.

The judgment will therefore be reversed, and the cause remanded. The other judges concur.

Wrong

THE STATE OF MISSOURI to the use of E. HEADLEE, Adm'r *de bonis non* of the Estate of Nathan Boon, deceased, Defendant in Error, *vs.* B. W. HENSLEE and WILLIAM F. NORFLEIT, Adm'rs of the Estate of G. P. SHACKELFORD deceased, Plaintiffs in Error.

1. *Practice, civil—Pleadings—Bonds—Breaches—General verdict.*—A suit on an administrator's bond alleged several breaches in not paying over money collected *Held*, that there was substantially but one breach,—the failure to pay over or account for money collected—and that a general verdict was proper.

*Error to Greene Circuit Court.*

*John P. Ellis*, for Defendant in Error.

NAPTON, Judge, delivered the opinion of the court.

This action is by the administrator *de bonis non* of Nathan Boon against the representatives of his administrator. After setting out the bond of Shackelford, the petition states, that Shackelford and Boon, his co-administrator, received assets of the estate of Nathan Boon to the amount of $19,714; that they were credited with $10,844, and still have in their hands $8,870. The petition avers a failure on the part of Shackelford and Boon to make annual or final settlement, and judgment is asked for the penalty of the bond, with execution for the amount so alleged to be unaccounted for.

The finding of the court was for $8,085.65, and a judgment for the penalty, and that the said amount was to be allowed in the Probate Court against the estate of said Shackelford.

A motion for a new trial was filed in the time authorized by the statute, which was overruled about a year afterwards, and then a motion in arrest was filed. The objections taken in both motions were purely technical, not going to the merits of the judgment.

Conceding, however, that the motion for arrest was in time, we see no ground for reversing the judgment of the court below in overruling it. It is said there were several breaches of the bond averred, and that upon each there should have been a separate verdict, but there was substantially but one, and that was the failure to pay over or account for the sum

alleged to have been received, and upon this there was a verdict and judgment.

Judgment affirmed. The other judges concur: Judges Wagner and Sherwood absent.

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E. T. RENSHAW, Respondent, *vs.* F. MCVEAN, Appellant.

1. Judgment affirmed.

*Appeal from Moniteau Circuit Court.*

*Burke & White*, for Appellant.

*Owens & Wood*, for Respondent.

SHERWOOD, Judge, delivered the opinion of the court.

This was an action brought in the Moniteau Circuit Court by Renshaw against McVean, for tearing down his fences and scattering his rails, for which alleged trespass a judgment for $100 was asked.

The answer was a general denial, and also attempted to justify by alleging, that the place, where the fences were thrown down, was a public highway, had been dedicated as such by the plaintiff, and used as such by the public, &c., &c. The replication traversed all the material statements of the answer. The cause was tried by a jury, and resulted in a verdict and judgment for the plaintiff for the sum of one dollar ($1.00). Upon looking over the whole record, the issues raised by the pleadings seem to have been fairly submitted to and tried by the jury; the verdict is supported by the evidence, and no material error was committed by the court in giving or refusing instructions or admitting or excluding evidence.

For these reasons, the judgment will, with the concurrence of the other judges, except Judge Adams, who is absent, be affirmed.

MISSISSIPPI PLANING MILL, Defendant in Error *vs.* PRESBYTERIAN CHURCH, Plaintiff in Error.

1. *Mechanic's lien—Notice to owners—Name of party claiming lien.*—A corporation, claiming a lien on certain property, gave notice to the owners thereof, stating its own name in full, but signed the notice with its abbreviated name, omitting "of St. Louis." *Held*, that the variation was not material, because the owners could not be misled thereby.
2. *Mechanic's lien—Account filed—Name of party claiming lien.*—A corporation, claiming a lien against certain property, filed its verified account with the clerk of the court. This account did not state the full name of the corporation, omitting "of St. Louis," but referred to the notice given to the owners of the property where the full corporate name was given; the affidavit to the account used the full corporate name: *Held*, that the owners of the property were not misled, and that there was a substantial compliance with the law.
3. *Practice, civil—Pleadings—Answer—Defect of parties.*—By answering to the merits, the defendant waives all objections on the score of defect of parties to the action.

*Error to Cole Circuit Court.*

*Ewing & Smith*, for Plaintiff in Error.

I. The lien paper, which had been filed in the name of "Mississippi Planing Mill Company," which was not the name of the plaintiff, was inadmissible. (32 Mo., 218.)

II. The mechanic's lien law, being in derogation of common law, must be strictly complied with. (28 Mo., 188; 15 Mo., 281; 1 E. D. Smith, 654.) The evidence cannot be supplied by parol testimony. (38 Mo., 188.)

III. There is no evidence that the church ever authorized the contract or ratified it afterwards. Corporations must speak by their records, if any kept, and there were in this case. (30 Mo., 118.)

*Lay & Belch*, for Defendant in Error.

I. The object of the notice and the lien is to give definite information of the character and amount of the claim, and, if they do this, they are sufficient. (Miller vs. Faulk, 47 Mo., 262.)

II. When the name given sufficiently designates the corporation, a contract cannot be avoided for a misnomer. (Ang. & Am. Corp., § 647; St. Louis Hosp. Ass. vs. Williams' Admr., 19 Mo., 609.)

III. Acts of corporations may be proved in the same manner as those of individuals, and no action in writing on the part of the Board of Directors is necessary. (South. Hotel Co. vs. Newman, 30 Mo., 118; Preston vs. Mo. & Pa. Lead Co., 51 Mo., 43.)

Vories, Judge, delivered the opinion of the court.

This action was brought to recover for materials sold to defendant Faulk, to be used by him in the erection of a house in the petition named, erected by him for the other defendants, and to enforce a mechanic's lien against said house, &c.

The petition stated, that the plaintiff was a corporation incorporated under the laws of this State; that the defendant, Mr. D. Faulk, prior to the 24th day of September, 1867, entered into a contract with the defendants, Austin A. King, Jr., O. G. Burch, E. W. Parsons, N. C. Burch, and D. G. Steele, who were the trustees of the Presbyterian Church of Jefferson City, Missouri, and the owners of the premises described, for the erection of a church building upon the lot of ground therein described; that defendant Faulk was the original contractor with the said owners for the building and furnishing the materials for the erection of said church, &c. The petition then sets out, that the plaintiff had sold said Faulk material to be used, and which was used, in the erection of the buiding, describing the building and the premises on which it was erected; that Faulk had failed to pay for said materials, that notice thereof had been given to the defendants, the trustees for the church and owners of the house, of the intention of plaintiff to enforce a lien on said house for its said demands; that the account had been duly filed with the clerk, with a description of the building and premises as the law directs, &c., &c. In fact there is no objection taken to the petition, or to the time of giving the required notice to the owners of the building, or to the time of filing the lien, or of the commencement of the suit to enforce the lien, provided the different steps to be taken by the plaintiff were otherwise legally sufficient. The defendant Faulk made default,

thereby confessing the action so far as he was concerned. The other defendants filed an answer, in which, after denying all of the material allegations in the petition, they aver, that they are only trustees of the Presbyterian Church of Jefferson City Missouri, which was organized in said city in February, 1866, which said church is a corporation by that name duly incorporated under the laws of this State, and that as such corporation it held the legal and equitable title and interest in the lot and building described in the petition, and that said defendants were only the trustees of said church and corporation, and have no title or interest in the said premises as such trustees. The defendants further aver, that said church, so incorporated as aforesaid, has an equitable interest in said lot and premises as described in plaintiff's petition, and which is sought to be charged with said lien, and that the plaintiff had knowledge of said equitable interest at the date of its alleged contract with said Faulk and of the filing of its supposed lien, and that said church and corporation is not made a party defendant to this action; wherefore it is averred, that said church or corporation cannot be made liable under a judgment obtained in this form, and that these are not proper parties defendants to the record, and that said suit should be dismissed, &c.

The plaintiff filed a replication to this answer, admitting that defendants were the trustees of said church, but denying all other affirmative allegations in the answer.

The case was tried before a jury. After the evidence was heard, and instructions given by the court, the jury found a verdict in favor of the plaintiff. The defendants filed a motion to set aside the verdict and grant them a new trial, setting out as causes therefor all of the causes usually set forth in such motions, sufficient to cover all of the points raised by the defendants in this case. This motion being overruled by the court, the defendants excepted. The defendants then filed a motion in arrest of judgment, which being also overruled by the court, they again excepted, and have brought the case to this court by writ of error.

The main, and it may be said, the only questions, arising in this case for the consideration of this court, grow out of the rulings of the court during the trial of the cause in reference to the exclusion or admission of evidence in the cause. It is true also, that the defendants objected to instructions given by the court for the plaintiff, and asked a number of instructions on their part, which were refused, to all of which actions of the court in giving and refusing said instructions exceptions were duly made by the defendants. Yet as these instructions only raised the same questions raised on the trial in reference to the admissibility of the evidence, no useful purpose could be accomplished by making any further reference thereto.

The first question raised by the record in this case, and which is insisted on by the defendants here, grows out of the objection made by the defendants to the notice served on them by plaintiff, notifying them that plaintiff held a claim against the building or improvement, as is required by the 19th section of the law concerning Mechanics' Liens. There is no question made as to the form of the notice, nor to the time in which it was served, but when the notice was offered in evidence on the trial it was objected to by the defendants, on the ground that the notice was signed or subscribed by the name of "Mississippi Planing Mill Company," and not by the name of "Mississippi Planing Mill Company of St. Louis," and that the notice was therefore irrelevant.

In the body of the notice it is stated, as follows: "You are hereby notified, that the Mississippi Planing Company of St. Louis, Missouri, holds a claim," &c., but the signature at the bottom of the notice omitted the words "of St. Louis" at the end of the corporate name of the plaintiff. The court overruled the defendants' objection to the notice, and admitted it in evidence.

We think the court did right. The notice being otherwise sufficient, it cannot be seen how the defendants could be misled by this notice. The notice informed them who it was that held the claim against their building, and where the plaintiff resided, giving the full and complete corporate name of

the plaintiff, and it could not be material to the defendant, that the notice was signed by the corporation by using an abbreviated designation. It is impossible to see how the defendants could have been misled or injured. They were properly informed as to the proper corporation who claimed the debt against the contractor, and this is all that the law requires so far as the name of the plaintiff is concerned.

The next objection raised by the record is, that the court admitted in evidence, against the objections of the defendants, the verified account filed with the circuit clerk of Cole county, which was intended to create and constitute the lien in favor of the plaintiff. It is not contended by the defendants in this court, that this account or statement is deficient in any other particular, except that it is variant, so far as the name of the plaintiff is concerned, from the name of the plaintiff as given in the petition, in this; that the account is made out in favor of "The Mississippi Planing Mill Company," omitting the words "of St. Louis" as stated in the petition. It is to be observed, that the affidavit to the account uses the whole complete corporate name, as stated in the petition, and refers to the notice given to the defendants where the full corporate name was also given, which seems to me to be sufficient to prevent any surprise on the part of the defendants; the substantial requirements of the law were fully complied with, and the variance complained of is so technical that it would be a denial of justice to hold the lien insufficient on that account. There were several other exceptions taken to the admission of other parts of the evidence, which depended on the same ground of variance, and for the same reason the court below properly disregarded the variance, and admitted the evidence.

It is further insisted by the defendants in this case, that the evidence of the witnesses shows, that the Presbyterian Church is a corporation and should have been made a party to the suit, as it had an equitable interest in the property to be effected. It is sufficient to say in answer to this objection, that by answering to the merits of the action the defendants waived

any objection they might have urged to the petition on the ground of a defect of parties to the action. The defendants sued were the persons who made the contract for the building, and who held the legal estate in the premises to be charged; they being proper parties, if other parties in interest were not also made parties, that fact would not defeat the action; the only effect that could result would be, that the judgment in the case might not, and in some cases would not, effect the interests of those who were not made parties.

It is also contended, that there is no evidence to show, that the contract was made by any one authorized to make it, that the proof shows that the church kept a record of its proceedings, and that, if it had either made or ratified the contract to build the house, it could only be proved by its recorded proceedings. It is sufficient to say, that parol evidence was admitted to prove the fact of a ratification of the contract to build the house made with defendant Faulk by the other defendants as the trustees of the church without objection, and it is too late to object to evidence for the first time in this count, and it further appears by the defendants' own evidence, that they had recognized the contract and paid Faulk for his work, after which it is scarcely fair in them to say that, as trustees of the church, they had paid for the erection of a house without recognizing or ratifying the contract they were performing.

I think every question raised by the defendants in this case is fully settled by this court in the case of Miller vs. Faulk, 47 Mo., 262, and that they need not be further examined here.

The judgment of the Circuit Court is affirmed, the other judges concurring.

THE STATE OF MISSOURI, Defendant in Error *vs.* WILLIAM GERMAN, Plaintiff in Error.

1. *Criminal law—Corpus delicti—Confession, without other proof of.*—A conviction of murder is not warranted when there is no other proof of the *corpus delicti*, but the uncorroborated extra judicial confession of the accused.

*Error to Jasper Circuit Court.*

*James F. Hardin & D. A. Harrison*, for Plaintiff in Error.

I. The court erred in admitting any evidence. There was no proof offered tending to prove that Canaday was dead, and without proof of the death, there could be no conviction. (Whart. Am. Crim. Law, § 745–6; State vs. Robinson, 12 Mo., 592; State vs. Scott, 39 Mo., 429; 1 Chit. Crim. Law, 563; 3 *Ibid*, 736; 1 Russ. Crimes, 567–8; 1 Greenl. Ev., § 217.) The confessions could not be used to prove the *corpus delicti*. See above cases.

II. The court erred in admitting the evidence of confessions testified to by the witness, C. W. Mallory. (1 Greenl. Ev., §§ 213, 263; People vs. Ward, 15 Wend., 231; State vs. Hector, 2 Mo., 166; 1 Phil. Ev., 544, and cases there cited; Archibald, Crim. Pl., 125–6; Roscoe Crim. Ev., 34; Joy Confessions, 38 Law Lib., 59–61; 7 Iredell, [N. C.] 239; 2 Hump., [Tenn.] 37; State vs. Scott, 39 Mo., 424; State vs. Robinson, 12 Mo., 592; State vs. Brockman, 46 Mo., 566.)

*H. Clay Ewing, Attorney General*, for Defendant in Error.

WAGNER, Judge, delivered the opinion of the court.

The defendant was indicted in the Circuit Court for murder in the first degree, in killing one Canaday. On the first trial he was convicted of the offense, with which he stood charged, but on his motion that conviction was set aside, and being again put upon his trial he was found guilty of murder in the second degree.

The testimony as preserved in the bill of exceptions, shows in brief, that the defendant and Canaday, lived together, Can-

aday, having married defendant's wife's mother; that on the day on which Canaday, disappeared, the two started together in a wagon, to a cornfield where they were working, about two miles distant. In the evening when defendant returned he was alone, and when inquired of concerning Canaday, he said that a couple of men came along where they were at work, and gave the old man a drink of whisky, and he went off with them. There was nothing unusual about defendant's actions and appearance, and he uniformly told the same story in reference to Canaday's absence.

After the lapse of several months, in the woods between the house where defendant lived, and the field where he went to work when he was accompanied by Canaday, a pair of old boots, and some other clothing were found, and also some bones. An attempt was made to identify the boots and clothing as those belonging to, and worn by Canaday, but the evidence only showed that they were similar, no witness swearing to a positive identification. Nothing was done towards arresting the defendant or fastening the alleged crime upon him, and in about eight months after Canaday's disappearance, he changed his residence, going into Kansas, forty miles distant from where he previously resided. A warrant was afterwards sued out against him, in Jasper county, charging him with the murder of Canaday, and an officer went and arrested him, in his own house. He accompanied the officer back to Jasper county, without any kind of resistance, and on the way, he was told by one of them, that it would be better for him, to confess.

After he was placed in prison, the officer who arrested him and was deputy sheriff, had several conversations with him. The officer says that those conversations were confidential; and upon another occasion he says that he had the prisoner completely "broke." At one of these conversations, and one only, the prisoner made the confession to him, which was given in evidence. From the officer's statment it seems that the prisoner labored under the impression, that there were certain witnesses who were going to swear that he committed the crime. He evidently believed that they would convict him, and he

told the officer, that he had made up his mind not to put the county to any more expense, and that he would plead guilty, and that he killed Canaday. There was a mere admission of killing; no time, place, or circumstances were given. He wanted the officer to see the judge and use his influence, to have his punishment as light as possible, and then to get up a petition to have him pardoned. The officer promised him that he would get up the desired petition, and told him that he thought he could be got out of the penitentiary, after he had been there a reasonable time. At the time this confidential interview was had, it appears that this same officer was engaged with others in procuring counsel to assist in prosecuting the accused to a conviction, for the purpose of obtaining a reward, that had been offered. It appears abundantly clear that, when the prisoner proposed to plead guilty and confess the crime, that he supposed, that he could plead guilty of murder in the second degree, and that no higher punishment than imprisonment in the penitentiary could be inflicted upon him under the indictment. But when he afterwards saw the indictment and became aware that it was for murder in the first degree, and that a conviction thereon might lead to an execution, he changed his mind, and declared that he would not plead guilty, but would stand his trial. Such is substantially the evidence as shown by the record. It will be observed that there was no evidence whatever, that Canaday was murdered, except the confession of the defendant, and that was made under circumstances which rendered it inconclusive and questionable indeed, whether it should have been admitted at all.

Confessions are divided into two classes, namely, judicial and extra-judicial. Judicial confessions, are those which are made before the magistrate or in court, in due course of legal proceedings, and it is essential that they be made of the free will of the party, and with full and perfect knowledge of the nature and consequences of the confession. Of this kind are the preliminary examinations, taken in writing by the magistrate, pursuant to statutes, and the plea of guilty made in open court to an indictment. Either of these is sufficient to

found a conviction upon, even if it be followed by sentence of death, they being deliberately made, with the advice of counsel, and under the protecting caution and oversight of the judge. Extra-judicial confessions, are those which are made by the party elsewhere than before a magistrate, or in court, this term embracing not only explicit and express confessions of crime, but all those admissions of the accused from which guilt may be implied. (1 Greenl. Ev., § 316.)

Whether extra-judicial confessions, uncorroborated by any other proof of the *corpus delicti*, are of themselves sufficient to found a conviction of the prisoner upon, has not only been doubted, but, in the best considered cases, denied. "In the United States," says Greenleaf, "the prisoner's confession when the *corpus delicti* is not otherwise proved, has been held insufficient for his conviction; and this opinion certainly best accords with the humanity of the criminal code, and with the great degree of caution applied, in receiving and weighing the evidence of confessions in other cases; and it seems countenanced by approved writers on this branch of the law." (*Ibid*, § 217.) Wharton, in his treatise on Criminal Law, lays down the doctrine in equally emphatic terms, and says that proof of the *corpus delicti*, by clear and satisfactory evidence must always precede a conviction. He approvingly quotes the language of Lord Hale, where that great judge says: "I would never convict any person for stealing the goods of a person unknown, merely because he would not give an account how he came by them, unless there were due proof made that a felony had been committed. I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body found dead." (1 Whart. Crim., Law, § 745-46.) A writer of standard excellence has said: It may be doubted whether justice and policy ever sanction a conviction, where there is no other proof of the *corpus delicti*, than the uncorroborated confession of the party. (Wills Circumst. Ev., § 6.) In murder trials, the rule laid down by Lord Hale, has been generally followed, namely, that the fact of death should be shown, either by witnesses who were

present, when the murderous act was done, or by proof of the body having been seen dead; or if found in a state of decomposition, or reduced to a skeleton, that it be identified by tests of the most clear and cogent character. These authorities have frequently received the approbation of this court. In Robinson vs. The State, (12 Mo., 592.) Judge Ryland, after examining many of the cases, laid it down as the settled rule, that the confession of a defendant, not made in open court, or on an examination before a committing court, but to an individual, uncorroborated by circumstances, and without proof *aliunde* that a crime has been committed, would not justify conviction. In the case of The State vs. Scott, (39 Mo., 424.) which was an indictment for robbery, where the evidence showed that the prisoner was riding in company with an old man, and he declared that he intended, to get into a "fuss" with the old man, and take his horse from him, and afterwards he was seen riding the horse, and he said that he had got into a "fuss" with the old man, and took his horse, this was held to be insufficient evidence to warrant a conviction, because there was no corroborative testimony that a crime had been committed. This doctrine was also recognized in the case of the State vs. Lamb, (28 Mo., 218,) where a conviction for murder was sustained, upon a judicial confession by the prisoner, which constituted the only actual proof of the commission of the crime. But there was a chain of corroborative circumstances, from which the evidence of guilt was irresistible. In the case at bar, there is an utter failure to prove the *corpus delicti*.

All the circumstances, proved by the State outside of the confession, may well exist and still be entirely consistent with the fact, that Canaday was never murdered, and that he is still alive; that a pair of coarse boots were found similar to his, is really no evidence. All boots bought of the store as his were, will look alike when worn; so with the clothes. The belt which it was first thought was his, upon a close examination proved not to be his. Mrs. Davis, the witness with whom he had lived when he was working on the railroad, and who had mended it for him, when she inspected it, said

that his belt was lined by her with a piece from an old calico dress, and that the belt produced and found, was lined with bed ticking, and was not his. The confession was made out of court, and lacks the necessary corroboration.

It further appears that it was made under a misapprehension, and that the prisoner did not have a full knowledge of all the facts, and of the consequences that would result therefrom. It is undeniable that the officer, to whom the confession was made, was in the prisoner's confidence, and exerted a great influence over him, and it may be well doubted whether it was properly admitted in evidence.

I think that the demurrer tendered to the evidence by the defendant's counsel, should have been sustained, and that the judgment should be reversed, and the cause remanded.

The other judges concur.

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D. K. STEELE, Respondent, *vs.* SAMUEL WEAR, Appellant.

1. *Legislature—Contest for seat in—Costs, how adjusted.*—The contestee for a seat in the General Assembly of the State cannot have his action against the unsuccessful contestor for costs expended in the contest, where the same is carried on before the Legislature. Section 58 of the Act touching Elections, (Wagn. Stat., 574,) applies only to contests had before the courts of the country.

*Appeal from Cooper Circuit Court.*

*Hayden & Tompkins*, for Respondent.

I. The right to costs depends altogether on Statute. (2 Bac. Abr. title "Costs," p. 484, "A"; Tidd's Pr. p. 864; Bouv. Law Dict. I Vol., title, "Costs," p. 370 and authorities referred to.)

II. That each House sits as a court, exercising judicial functions in deciding upon the election, etc., of members, and that their judgments in such cases are conclusive. (See Cool. Const. Lim., p. 133.)

III. If costs were allowed as part of such judgment, then

the only means to enforce payment of them is by process on the judgment, or by suit based on it, and an action in the nature of assumpsit for cost *eo nomine* will not lie. (Wagn. Stat., 574, § 58.)

*McMillan Bros.*, for Respondent.

I. The statute in relation to Elections provides that, "in all contested election cases, costs may be adjudged against the unsuccessful party, and payment thereof enforced as in civil cases." And the statute in relation to costs in civil cases, provides that, "in all civil actions or proceedings of any kind, the party prevailing shall recover his costs against the other party, except cases in which a different provision is made by law." (Wagn. Stat., 374, § 58, also, 343, § 6.)

II. The justices of the peace, selected by appellant and respondent to attend to the taking of the depositions in said contested election case, had no power to adjudge costs. Their power is limited by the statute to subpœnaing witnesses and taking and certifying the depositions. The House of Representatives could not enter up a judgment and enforce its collection as in civil cases. Hence the statute above referred to would be meaningless when applied to the case at bar, unless the respondent has his remedy against appellant in a civil action to collect costs which are forced upon him in an unsuccessful attempt by appellant to oust him from his seat in the legislature.

III. The appellant being unsuccessful in his said contest before the legislature, the statutes make him liable to the respondent for costs, and the respondent may bring his action to enforce the collection thereof, in any court of competent jurisdiction. (Davis vs. Farmer, 28 Mo., 54; Peralta vs. Adams, 2 Cal., 594.)

Vories, Judge, delivered the opinion of the court.

This action is brought by the plaintiff to recover from the defendant, certain costs expended by plaintiff in a proceeding, instituted by defendant before the House of Representatives

of the General Assemby of the State of Missouri, to contest the election of plaintiff to the office of representative from Cooper county, to said House of Representatives.

The petition is substantially as follows. It is charged that plaintiff was on the eighth day of November, 1870, duly elected, Representative to the Twenty-sixth General Assembly of the State of Missouri from the Second Assembly District of Cooper county in said State; that on the first day of December, 1870, said defendant proceeded to contest the declared election of plaintiff as such representative, and in pursuance of the statute in such case provided, plaintiff selected and employed one George W. Koonts, a Justice of the Peace, for Cooper county, to attend to the taking of the depositions in said contest on the part of plaintiff; that said justice, in connection with a justice selected by the defendant, proceeded to take the depositions of witnesses in said cause, for the period of seventeen days, and which said depositions were duly certified and sent to the speaker of said House of Representatives of the Twenty-sixth General Assembly, of the State of Missouri as the law directs; that in and about his defense to said contest, plaintiff was compelled to and did spend a large sum of money in procuring the services of constables in summoning witnesses and justices of the peace, in issuing subpœnas and in fees paid witnesses for their attendance to give their depositions. The petition setting forth the officers and witnesses to whom the money was paid and the amount paid each, amounting in the whole to $158.15, which said sum consisted of th e legal fees, of such officers and witnesses for their services and attendance, etc.; that said contest was prosecuted before said House of Representatives by defendant to its final termination in which defendant was defeated in his contest and plaintiff by the final decision and resolution of said House of Representatives, declared to be the duly elected member, etc. Whereby an action accrued to plaintiff to have and recover of and from the defendant, the said sum of money so expended with interest, costs, etc., and for which judgment was prayed.

The defendant demurred to this petition, stating among other

causes that the petition, did not state facts sufficient to constitute a cause of action, and that from the facts stated in the petition no such sums were allowed by law for such services, as costs, and that no costs had been adjudged in plaintiff's favor, wherefore no recovery could be had in the case. The court overruled the demurrer, and the defendant refused to further plead in the cause, when final judgment was rendered in the cause in favor of the plaintiff, for the sum of $165.26 with costs. From this judgment the defendant appealed to this court, where he insists that the petition contains no cause of action and that his demurrer ought to have been sustained. The only question presented to this court by the record of the case is whether the petition of the plaintiff presented facts, out of which a legal liability could arise on the part of the defendant, to pay the plaintiff the money demanded.

At common law the plaintiff was not entitled to recover costs in any case. Statutes were passed in England allowing the recovery of costs, in cases where damages were recoverable, and costs could be recovered there in no other cases except the recovery was authorized by a statute authorizing the recovery of costs, in the particular case. (Kneass vs. The Schuyler Bank, 4 Wash C. C., 106; Hart vs. Fitzgerald, 2 Mass., 509.)

In most of the States in this country, costs are made recoverable by the prevailing party in an action. In some states, even what is considered a reasonable fee for the attorney of the successful party, is recoverable from his antagonist, in the way of costs, and in this State a fee is recoverable against the defendant in criminal cases, in favor of the prosecuting attorney. In civil actions costs are allowed in this State to the prevailing party in almost, if not all civil actions prosecuted in the courts of this State. By the sixth section of the statute concerning Costs (Wagn. Stat., [Ed. 1872,] 343), it is provided that "in all civil actions or proceedings of any kind, the party prevailing shall recover his costs against the other party, except in those cases in which a different provision is made by law." This changes the rule of common law and establishes the general rule, that costs are recoverable in civil actions or proceed-

ings unless a different provision is made by law, but we do not think that this statute applies to contested elections, not even in cases where the contest is had before the courts of the country. The statute only applies to the general actions and proceedings commenced and prosecuted in the courts of the country, where costs can be recovered as a part of, and incident to the judgments rendered by the courts. It seems that the legislature so understood it, for when we refer to the statute concerning contested elections, we find that a special provision is made in reference to costs where such contests are had before the courts of the country.

By they 58th section of the statute concerning Elections, (Wagn. Stat., 574,) it is provided that, "In all contested elections costs may be adjudged against the unsuccessful party, and the payment thereof enforced as in civil cases." This section it will be observed from its connection with the other sections of the act, and from the whole subject matter only applies to contests of elections which can be had before the courts where costs can be adjudged and the payment thereof enforced as in civil cases by execution on fee bill or in some other manner provided for in the courts. In the very nature of the case, no costs could be adjudged or enforced by the House of Representatives, where they decide the contest by resolution of the House. No judgment is rendered or could be rendered or adjudged in such cases, and no payment could be enforced as costs are enforced in civil cases. It could not, therefore, have been intended by the legislature that this last quoted section should apply to any contests but those authorized to be contested in the courts of the country. It may be hard in such case for the plaintiff to be put to costs, which he had no means provided by law by which he could recover it back from the unsuccessful party; but the common law gives him no remedy, in such case, and we do not think he has any by statute.

The cases referred to by the plaintiff, are cases where costs were plainly allowed, and, in fact, an express promise or understanding to pay them. (Heard vs. Farris, 1st Littell [Ky.] 246.)

The demurrer in this case ought to have been sustained.

The judgment of the Cooper Circuit Court will be reversed. The other judges concur.

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TENNESSEE STEWART, *et al.*, Defendants in Error, *vs.* JAS. R. CALDWELL, *et al.*, Plaintiffs in Error.

1. *Administrator—Demand allowed by collusion—Sale of lands—Bill in equity, to postpone.*—Where a claim against an estate is allowed, and land belonging thereto is about to be sold to satisfy the allowance, through fraud and collusion between the administrator and the claimant, a bill in equity by the heirs to set aside the allowance and postpone the sale is a proper remedy, notwithstanding that an action of damages would lie against the administrator on his bond. Such action would sound only in damages and would fail to reach the land. Jurisdiction by a court of equity is not ousted in such case, because a remedy exists at law.

*Error to Henry Circuit Court.*

*Ladue & Vance*, for Plaintiffs in Error.

I. The petition states a good cause of action in equity. (Harris, *et al.* vs. Terrell's Ex'r, 38 Mo., 421.)

II. A judgment collusively or fraudulently procured should be set aside at the instance of the party against whom it is procured. (Miles vs. Jones, 28 Mo., 87; 19 How. Prac., 289; 21 Barb., 9; 26 Barb., 262.)

III. The allegations of the petition are ample and sufficient to entitle the plaintiffs to a hearing in a court of equity. (Sullivan vs. Burgess, 37 Mo., 300.) The allowance being obtained by fraud, it can only be set aside in a Court of Equity, (23 Mo., 95; 15 Mo., 225; 20 Mo., 87; 14 Mo., 116.)

*Wright & Boone*, for Defendants in Error.

I. The petition is radically defective, because it shows upon its face, that plaintiffs in error had a full and adequate remedy at law. The judgment of the Probate Court, in allowing the claim complained of, and which is sought to be set

aside, was a judgment from which an appeal might have been taken. (Wagn. Stat., 119, § 1.) Hence, plaintiff cannot resort to equity for relief. (Cabanne vs. Lisa, 1 Mo., 683; Janney vs. Spedden, 38 Mo., 375.)

II. The order of the Probate Court for the sale of lands to pay debts, is a judgment at law, from which an appeal may be taken. (Frye vs. Kimball, 16 Mo., 9; Wolf, *et al.*, vs. Wohlien, *et al.*, 32 Mo., 124.)

SHERWOOD, Judge, delivered the opinion of the court.

This was a suit, in the nature of a bill in equity, brought in the Henry County Court of Common Pleas, by the heirs at law, who were the children and grandchildren, of John R. Elliott, deceased, to set aside a certain order and judgment of allowance, made and entered in the Probate Court of said county, in favor of defendant, Jas. R. Caldwell, and against the estate of said decedent.

The petition in substance alleges that John R. Elliott, the decedent, died seized and possessed of a considerable amount of real estate, which had descended to and was held by the plaintiffs as tenants in common; that defendant, Henry Shafer, was appointed administrator of said decedent's estate, and, as such, took charge of and proceeded to administer upon the same; that the allowance in question was obtained and entered by fraud and fraudulent collusion between the said defendants, Caldwell and Shafer; that Caldwell knew that he had no demand against the estate, and that the same was not indebted to him, and the administrator, knowing this also, waived notice of, and made no defense against the claim, and concealed the allowance thereof from plaintiffs, in order to prevent them from showing to the court, that the same was fraudulent and unjust, and in consequence of such concealment, plaintiffs knew nothing of such allowance, until long after the fraudulent design was effectuated; that some time before the death of decedent, defendant, Caldwell, sold and conveyed to said deceased, certain lands in Henry County, and received, as the partial consideration therefor, certain promissory

notes and accounts, which were transferred to him without recourse, and at the risk of the transferee, which arrangement was entered in a written contract made at the time; that Caldwell, for the purpose of more effectually carrying into effect his said fraudulent purpose of obtaining the said fraudulent allowance, surreptitiously and wrongfully took possession of said instrument, which was then made by and between deceased and himself, and has secreted or else destroyed the same; that Caldwell based his fraudulent pretenses for an allowance against said estate, on the ground that he was unable to collect a portion of the notes thus transferred to him, and that said estate was therefore liable to pay him the amount of said notes remaining uncollected; that, aside from the fraudulent demand as aforesaid allowed, the estate was indebted in a very inconsiderable sum, which had either been paid or for the liquidation of which the personal assets were ample; that, notwithstanding this state of facts, the administrator, Shafer, had, though well knowing that there was no necessity for an order for the sale of the lands thus descended, procured an order for the sale of such lands, under the pretense that the personal assets of the estate were insufficient for the payment of debts, &c., &c.

The petition concluded with a prayer that the allowance might be vacated and set aside, and the sale of the land postponed until a final hearing, and for other and further relief. The petition was held insufficient on demurrer, which alleged as grounds: 1st—That plaintiff, as shown by the petition, had an adequate remedy at law, by appeal from the judgment of allowance; 2nd—That, if injury had resulted, as alleged, from the acts of the administrator, a complete remedy at law existed by action on his bond; 3rd—That the petition contained no equity.

The court manifestly erred in adjudging the petition insufficient. A stronger case for equitable interference, was never presented than that which the demurrer confesses to be true. The reason why the plaintiffs did not avail themselves of an appeal is sufficiently set forth in the petition; the alleged

fraudulent concealment, cut them off from the benefits conferred by an appeal, even were we to concede, that the heirs of an intestate are possessed of such privilege. Nor could a suit on the bond of the administrator be regarded as adequate and complete, because a recovery on such bond, if it could be obtained, would sound only in damages; while the land which had descended to the heirs would have been, in the meanwhile, disposed of; and courts of equity usually attach far greater importance to land, as possessing an intrinsic value, not the subject of either computation or compensation in damages. But fraud belongs to the original jurisdiction, always exercised by a court of equity, and constitutes its "most ancient foundation"; and such jurisdiction is not ousted because a remedy exists at law, for the jurisdictional powers formerly possessed by that court, still continue unaffected by the enlargement which is taking place in the functions of the courts of law; and will not be extinguished by anything short of direct and positive prohibitory enactment. (1 Sto. Eq. Jur., §§ 64, 80, and cas. cit.) A petition in all its essentials precisely similar to the one under consideration, was held good by this court, in Mayberry vs. McClurg, 51 Mo., 256; See also Harris vs. Terrell's Ex'rs, 38 Mo., 421 and cas. cit.; Miles vs. Jones, 28 Mo., 87; 1 Sto. Eq. Jur., § 252.

Judgment reversed and remanded. The other Judges concur.

STATE OF MISSOURI, *ex rel.*, A. J. BAKER, ATTORNEY GENERAL, Respondent, *vs.* GREENE COUNTY AND GREENE COUNTY COURT, *et al.*, Appellants.

1. *Railroads—Subscriptions to—County bonds—Charter—Subsequent general statutes.*—A provision in the charter of a railroad company, authorizing county courts to subscribe stock to such railroad without a vote of the people, is not repealed by subsequent general laws, nor by the subsequent adoption of the present Constitution. [Smith v. Clark County, *ante*, p. 58.]
2. *Railroads—Counties and municipal bodies, subscription to—Privilege.*—The power conceded to counties or other municipal bodies by a railroad charter, to take and subscribe stock in such railroad, was intended as a privilege to the railroad. [*Idem.*]
3. *Railroads—Consolidation—Effect of.*—When several railroads consolidate, the new road shall stand in their place, and possess the rights, power and privileges they had severally enjoyed in the portions of the road which had previously belonged to them.
4. *Railroads—Bonds, county—Kansas City & Cameron R. R.—Consolidation—Branch road—Act of March 21, 1868.*—The action of the directors of the Kansas City & Cameron R. R., formerly the Kansas City, Galveston & Lake Superior R. R., in determining to build a branch R. R., in accordance with the act of March 21, 1868, and the charter of the Kansas City, Galveston & Lake Superior R. R., and the acts amendatory thereto, followed by the partial building thereof, and followed by their own consolidation with the Han. & St. Joseph R. R., did not deprive such branch road of the privilege of subscriptions from county courts of the counties along the line of the road without a prior vote of the people therein, such privileges being contained in the original charter of the Kansas City, Galveston & Lake Superior R. R.; such branch road was authorized by and was built in conformity to the provisions of the original charter, and, under the act of March 21, 1868, though nominally a branch, was in reality a distinct and separate road from the Hannibal & St. Joseph R. R.

Per VORIES, J., dissenting.

1. *Railroads, subscription to—Counties—Consolidation—Different enterprise.*—A power given to a county to subscribe to a specific R. R. enterprise will not authorize the county to subscribe to the stock of a wholly different company with a different enterprise in view, although the former company may have become consolidated with the latter, or transferred its corporate rights to it, unless such consolidation or transfer was contemplated by the original charter, or was provided for by the general law.
2. *Railroads, subscription to—Charter of Kansas City, G. & L. S. R. R.—Act of March 21st, 1868—Statute, construction of—Branch R. R.—Constitution.*—The act of March 21st, 1868, did not enlarge the power of County Courts to subscribe to the stock of the Kansas City, G. & L. S. R. R. under its charter, and authorize them to subscribe for special stock in the branch road proposed to be built. Besides, such construction would be contrary to the Constitution then in force.

3. *Corporations, municipal—Public improvements, power of subscription to.*—Municipal corporations have no inherent right of legislation, and can only subscribe for stock in public improvements, when such power is given to them by the Legislature, and when the Constitution of the State does not prohibit it.

4. *Corporations, municipal—Bonds—Authority to issue—Innocent holders.*—Municipal corporations having no inherent power to issue bonds, their power to issue bonds is a question of law of which all must take notice at their peril, and there can be no innocent holders without notice of such bonds.

*Appeal from Circuit Court of Greene County.*

*Nathan Bray, with whom were Crawford & Cravens,* for Appellants.

I. Under the facts of the case, the County Court of Greene county had power to make the subscription without an affirmative vote of the voters of the county. (1 R. C., 1855, p. 427, § 30; Sess. Acts 1861, p. 60; 22 How., 365.)

II. The act, amendatory of sec. 30 of the act of 1855, passed in 1861, though passed after the act chartering the Kansas City, Galveston and Lake Superior Railroad Company, did not repeal the charter of said company, so far as the right to subscribe stock by a county without a vote first having been had, as was embodied in that charter. Statutes, where they both relate to the same subject matter, must be so construed as to make both effectual, if such a construction can be given them without doing violence to the language of the acts or the manifest intention of the Legislature in passing the laws. A general prohibition to subscribe stock in any corporation may well subsist with a permission to subscribe stock in a particular corporation. (St. Louis vs. Alexander, 23 Mo., 483; State vs. Macon County Court, 41 Mo., 453; Cass v. Dillon, 2 Ohio St., 607; State v. Trustees Union Township, 8 Ohio St., 394; Bacon Abr. "Statute letter D"; Sedg. Com. Law, 123; Dwar. Stat., 532.)

III. This branch road commences and ends at the same places designated for the branch road in the charter of the Kansas City, Galveston and Lake Superior R. R. This right to build this branch road was granted to the old company, and that it transferred that, together with all other rights, to the Kansas City & Cameron R. R. Co., and it by the act of con-

solidation with the Hannibal & St. Joseph R. R. Co. transferred, and the said H. & St. Jo. R. R. Co. became possessed of, the same right under the charter and the act of consolidation, is admitted by the pleadings. So the Hannibal & St. Joseph R. R. Co. stands just where the old company stood, or would now stand had it not transferred its franchises, &c. So appellants in error maintain that the adoption of the act of March 21st, 1868, by the Board of Directors of the Hannibal & St. Joseph R. R. Co. in nowise affected, altered or changed the power of the county court to subscribe stock to the building of said branch road. The power existed when the subscription was made the same as it did when the act of incorporation of date, Feb 9th, 1857, was passed and by the corporators accepted. That the court then possessed the power to make the subscription without a vote of the tax-payers, is not doubted. If it then had the power, it still has the power. (State vs. Sullivan County, 51 Mo., 522; Smith vs. Clark County, 54 Mo., 58; Grand Chute vs. Winegar, 15 Wall., 385; Nicholay vs. St. Clair County, U. S. Cir. Ct. West. Dist. Mo. [Nov. Term, 1873]; Kenicott vs. Supervisors, 16 Wall., 452; St. Joseph Township vs. Rogers, 16 Wall., 644; R. R. Co. vs. County of Ostoe, 16 Wall., 667; Olcott vs. Supervisors, 16 Wall., 678.)

*Bland & Baker*, for Respondents.

I. The power granted by the charter of 1857 to the County Court, to subscribe for the stock of the corporation, cannot be construed to confer a power to subscribe for special stock—for stock which carries with it a proprietary interest in a part of the property of the corporation, and not in the whole—in the branch line only, and none in the main line. (Marsh vs. Fulton County, 10 Wall., 676; Ranney vs. Baeder, 50 Mo., 600.) No such franchise (to subscribe for stock in a branch line) was vested in the Kansas City, Galveston and Lake Superior Railroad Company under its charter in 1857. How then could such a franchise pass over to the Hannibal & St. Joseph Railroad company by virtue of the consolidation?

II. By the adoption of the act of March 21, 1868, the corpo-

ration elected to proceed in the taking of subscriptions and the building of the branch under the act, instead of proceeding, as it might have done, under its chartered powers, to take the subscription authorized by the charter:—and when the corporation elected to avail itself of the provisions of that statute by filing a resolution to that effect with the Secretary of State, as provided in the first section, and proceeded to take stock in aid of building the branch, then the provisions of the statute took hold of the company in respect to that enterprise, and become, by its express provisions, the governing law of all the proceedings in regard to the building of such branch, and they were of controlling force in interpreting the nature and legal incidents of the subscriptions taken, and of the stock to be issued. The subscription being made under the provisions of the statute of 1868, it was a special subscription as distinguished from a general subscription to the stock of the corporation, in that it controls the application of the fund subscribed to the branch in aid of which it was made; and in that it entitles the subscriber to special stock limited to the branch line, instead of general stock carrying an interest in the main line and branches; and this is so by the operation of the statute itself, which determines the kind of stock to be issued.

III. This act of March 21, 1868, under which the subscription was made, could not confer the authority on the County Court to make the subscription without first ordering an election, because it was within the prohibition of the constitution. It must be obvious, therefore, that there was no power whatever in the County Court to make the subscription, issue the bonds and levy the tax in question, and its acts in the premises were clearly without lawful authority, and absolutely void.

WAGNER, Judge, delivered the opinion of the court.

Whether this suit was properly brought, or whether an injunction would lie under the circumstances disclosed in the bill, I will not stop to inquire into, as both parties have expressed

a desire to have the case determined on the merits. The simple question is, whether the County Court of Greene county had the power to make the subscription, that it did in the railroad hereinafter referred to, without first being authorized by the vote of the people? The court below decided against the power, and awarded a perpetual injunction against making any collections for the purpose of paying the county indebtedness in consequence of the subscriptions.

The facts set up in the answer, and admitted by the demurrer, are: That the General Assembly of the State of Missouri incorporated the Kansas City, Galveston & Lake Superior Railroad Company, by an act approved February 9th, 1857; that in pursuance of said act of incorporation, the corporators named in the act duly organized themselves on the 11th day of May, 1857, under the name and style aforesaid; that, by the provisions of the said act, the said railroad company was authorized to construct a branch railroad, commencing at or near the city of Kansas, to any point on the southern boundary of the State, which the directors thereof should select, to connect with any road or roads leading to or in the direction of Memphis, Tennessee, or Napoleon, in the State of Arkansas; and that the County Courts of any county, through which any part of said railroad or its branches may be, or of any county adjoining thereto, were authorized to subscribe to the stock of the said railroad company, and to issue bonds of such county to raise funds to pay the same; and, for the purpose of said act, to appoint an agent to subscribe for stock to said railroad in the name of and on behalf of said county or counties; and that on the 13th day of February, 1864, the legislature, by an act entitled an act to amend an act to incorporate the Kansas City, Galveston & Lake Superior Railroad Company, authorized the Board of Directors thereof to at any time change the name of the said company; and that the board of directors of the company did afterwards in the year 1864 change the name of said company to the Kansas City & Cameron Railroad Company, and that, by the terms and provisions of said last act, the Kansas City and Cameron Rail-

road company acquired, possessed and retained all the rights, privileges and franchises, which existed under and by virtue of the charter of the Kansas City, Galveston & Lake Superior Railroad Company; that by another amendatory act, which was approved March 11th, 1867, it was provided, that it should be competent for the said Kansas City & Cameron Railroad company to consolidate their said railroad company with any other railroad company, on such terms as should be deemed just and proper, and that afterwards in the year 1870 the said Kansas City & Cameron Railroad company did consolidate with the Hannibal & St. Joseph Railroad company, by virtue of which consolidation the Hannibal & St. Joseph Railroad company became the owners of, and possessed of, all the rights, property, privileges, immunities and franchises, which the said Kansas City, Galveston & Lake Superior railroad had and possessed by virtue of its charter and of the said acts of the Legislature amendatory thereto, or which the Kansas City & Cameron Railroad Company had by virtue of the charter of the Kansas City, Galveston & Lake Superior Railroad company, and the amendatory acts to its charter; that on the 3d day of October, 1869, the Kansas City & Cameron Railroad Company, by a resolution adopted by the Board of Directors of said company, at a meeting held in Kansas City in pursuance of its by-laws, resolved, that the Kansas City & Cameron Railroad Company was desirous of availing itself of the provision of the general laws of the State authorizing railroad companies to construct branch railroads, approved March 21st, 1868, and of the provisions of the Kansas City & Galveston R. R. Co. in relation to the construction of a branch railroad as specified in section 13 in said act, approved February 9th, 1857, as also by the acts of the Legislature amendatory thereto; and provided, that the name of the said branch railroad should be the Kansas City & Memphis railroad, and that the same should commence at the city of Kansas, in Jackson county, Missouri, to intersect with the main line thereat; thence to be built through the counties of Jackson and Cass in a generally southern direction to the southern boundary of the State, in the direction of Mem-

phis, Tennessee, as prescribed in section 13 of the charter of the Kansas City, Galveston & Lake Superior R. R. Co.; that certain persons, naming them, were appointed a Board of Directors of said Kansas City & Memphis R. R., with full power to take all needful steps to complete their own organization, to procure subscriptions of stock to said railroad, and for that purpose to open books for subscriptions, and to do all other acts which the Kansas City & Cameron R. R. Co. might or could lawfully do in relation to the building, construction and operation of said branch railroad; that a duly certified copy of the proceeding of said Board of Directors of the Kansas City & Cameron R. R. Co. were filed and duly recorded in the office of the Secretary of State.

It is further alleged, that after the said railroad had been built from Kansas City in Jackson county to Cameron in Clinton county, and after the said Kansas City & Cameron R. R. Co. had consolidated with the Han. & St. Jo. R. R. Co., that the latter company, at a meeting of the Board of Directors thereof regularly held, notified, confirmed and approved the resolutions passed by the Board of Directors of the Kansas City & Cameron R. R. Co., and then resolved, that the said Han. & St. Jo. R. R. was desirous of continuing the work already begun on the said branch railroad, and was desirous of availing itself of the laws authorizing the building of branch railroads, and especially the branch railroad known as the Kansas City & Memphis Railroad, and then and there authorized and empowered the Board of Directors of the Kansas City & Memphis R. R. to build said branch, and to aid them in so doing, and to authorize and empower them to do so, vested in and conferred on the Board of Directors of the Kansas City & Memphis R. R. all the powers and rights, which the Han. & St. Jo. R. R. had under the laws aforesaid, and a committee was appointed as an executive, construction and managing committee on behalf of the Han. & St. Jo. R. R. Co. with full power to construct, maintain, manage and operate said branch railroad, and for that purpose to receive subscriptions and do all things needful, which the Han. & St. Jo.

R. R. Co. might lawfully do under the laws of the State, in the construction, maintaining and operating said branch railroad; that a certified copy of the proceedings of the Board of Directors of the Han. & St. Joe. R. R. Co. was filed and duly recorded in the office of the secretary of State on the 5th day of July, 1870; that the committee thus appointed did open books for the subscription of stock to the Han. & St. Joe. R. R. Co., to aid in building and equipping the branch road of the Han. & St. Joe. R. R., known as the Kansas City & Memphis R. R., and that the County Court of Greene county subscribed the stock now in controversy, and appointed a commissioner to make the same. It is also averred, that the bonds of the county for said subscription have been sold to innocent purchasers, and that the road-bed has been graded through the county.

The fact, that the bonds have been negotiated and sold, is a question that need not be considered, as the bond-holders are not before the court, and the only question now is, did the law authorize the county to make the subscriptions?

Essentially the same question as here raised was presented in the case of the State vs. Sullivan County Court, 51 Mo., 522, and it was there held that the power existed. But the matter has again been pressed on the attention of the court, especially with reference to the act of 1868, which, it is contended, is unconstitutional, and, as the act was not particularly mentioned in the above case, it may be deserving of further consideration.

By the thirteenth section of the act to incorporate the Kansas City, Galveston & Lake Superior R. R. Co., (Sess. Acts of 1856–7, p. 166,) it is provided, that "said company shall have full power to construct a branch railroad, commencing at or near the city of Kansas, to any point on the southern boundary of the State, the directors may select, to connect with any road or roads leading to or in the direction of the city of Memphis, in Tennessee, or Napoleon, in the State of Arkansas, and shall be governed in all respects by the provisions of this act in the construction and operation of said branch road."

The fifteenth section declares, "it shall be lawful for the County Court of any county, in which any part of the route of the said railroad or branches may be, or any county adjacent thereto, to subscribe to the stock of the company, or invest its three per cent. fund, or other internal improvement fund belonging to the county, as stock in said road, and, for the stock subscribed in behalf of the county, may issue the bonds of the county to raise the funds to pay the same, and to take proper steps to protect the interest and credit of the County Court; may appoint an agent to represent the county, vote for it, and receive the dividends. Any incorporated city, town or incorporated company, may subscribe to the stock in said railroad company, and appoint an agent to represent its interests, give its votes, and receive its dividends, and may take proper steps to guard and protect the interests of said city, town or corporation."

An act was duly passed and approved February 13th, 1864, amending the charter of the Kansas City, Galveston & Lake Superior R. R. Co., which authorized the said company to change its name (Acts 1863–4, p. 481, § 2); and by an act approved March 11th, 1867, it was enacted, that it should be lawful and competent for the said company to make such arrangements with any other railroad company to furnish equipments and to run and manage its railroad, as it may deem expedient and find necessary, or to lease the same, or to consolidate it with any other company upon such terms as may be deemed just and proper. (Acts 1867, p. 143, § 2.)

The above are all the provisions of law bearing upon the questions presented, up to the passage of the law of March 21, 1868. (Sess. Acts 1868, p. 90–91.)

The first section of this last act provides, that any railroad company in this State authorized by law to build branches, and wishing to avail themselves of the provisions of the act, shall by its Board of Directors pass, and cause to be entered upon its records, a resolution setting forth such desire, and designating the name under which such branch shall be built, its point of intersection with its main line, and general course,

a certified copy of which resolutions shall be filed with the secretary of State, after which they shall be governed by the provisions of the act.

Section two provides, that whenever any such railroad company shall undertake the construction of a branch designated as provided in the first section, they shall receive donations and subscriptions to stock to aid in its construction, in the name of such branch, which shall be expressed in the certificate of stock issued; the cost and expenses of constructing and operating such branch shall be kept separate and distinct from expenses on the said main line.

They may borrow money, and issue bonds secured by mortgage on such branch road, to aid in its construction, and in general may operate, lease, sell or consolidate with any connecting road distinct and separate from their main line; and in any other way may manage or dispose of such branch as by law they may be authorized with reference to their main line, and separate therefrom.

The third section declares, that any branch road so constructed shall not be holden for any debt, lien or liability of the main line, nor shall the main line be holden for any debt, lien or liability of such branch; and that any dividends of profits arising out of the business of such branch road shall be divided among the stockholders in such branch, and in all respects the interest of the stockholders in the branch shall be kept separate and distinct from the interests of the stockholders in the main line.

By section four it is declared, that the holders of stock in any railroad company, which was subscribed in aid of the construction of a branch road according to the provisions of the act, shall have the same rights as other stockholders in the company in the choice of officers; but in all matters directly and specifically affecting the interests of such branch road, the stockholders in such branch shall control; and for such purpose the directors under their by-laws may, or on the petition of parties representing one-tenth of such stock shall, call a meeting of the stockholders in such branch, setting forth the object

of such meeting; and at any such meeting such stockholders may instruct the Board of Directors in all matters relating especially to their interests; and they shall be governed by such instructions, if not inconsistent with the laws of the State and the powers of the company.

The legislative enactments, above cited, show, that the original charter of the Kansas City, Galveston & Lake Superior R. R. Co. gave the power in direct terms to construct the branch road out of which this suit sprang; that it described its beginning point and terminus, namely: at or near Kansas City to the southern boundary of the State, in the direction of Memphis, Tennessee, or Napoleon, in the State of Arkansas. Authority was given to any County Court of any county, through which the branch road ran, to subscribe stock to the company, and to issue its bonds to raise funds for the purposes of construction. It was afterwards authorized to change its name, which it did, and then power was granted to the company to make arrangements with any other railroad company to furnish equipments and run and manage it, or to effect a consolidation.

As the charter was granted, and the power given to subscribe stock without taking a vote of the people, long anterior to the adoption of the present constitution, by a special enactment, the settled law of this State is, that it was not impaired or taken away by any of the subsequent general laws or the constitutional prohibition. This question was recently reviewed in this court, and the cases cited, in Smith vs. Clark County, *ante*, p. 58, and need not be further referred to. The proposition is undoubted, that under the original charter and the amendment thereto, prior to the act of 1868, it was lawful for the County Court to make subscriptions. And if it can be shown, that this proceeding is independent of that act, and does not depend upon it in any manner for its exercise, then I think its validity must be upheld.

If the act of 1868 substantially changes the character of the company, or attempts to confer upon County Courts the power to make subscriptions without first submitting the question

to the qualified voters, then as to such matters I have no hesitation in pronouncing it void. In other words, the act could not organize a new company giving it such power, nor confer any additional power in relation to making subscriptions without the vote of the people where it did not previously exist. It may be said, that the consolidation with the Han. & St. Joe. R. R. Co. merged the existence of the branch in an entirely new company, and therefore it was no longer the company to which the legislature had granted the original powers, and that the company being extinct, the powers were extinguished, and that although the power to take the stock was formerly given, it was a mere privilege delegated to the counties, and was not a franchise which adhered to the company in its new organization.

The difficulty in sustaining this construction is, that the branch road remains still the same as it was before the consolidation took place. And the decisions of this court have been, that the power conceded to the courts or other municipal bodies, to take and subscribe stock in railroads, was intended as a privilege to the corporations. (Smith vs. Clark County, *supra.*)

Now, what was the effect of the consolidations? In the case of Philadelphia & Wilmington R. R. Co. vs. Maryland, (10 How., 376,) it appeared, that the railroad line between Baltimore and Philadelphia, before it was consolidated, originally belonged to several distinct organizations. One of these companies was exempt from certain taxation, and it was claimed by the consolidated company, that this exemption was transferred to it, and affected all parts of the line. The act authorizing the union of the several companies provided, that the said body corporate so formed should be entitled "* * * to all the powers and privileges and advantages then belonging to the former corporations," and the new company claimed the exemption from taxes as one of the privileges and exemptions acquired, but the court held that the exemption did not extend to a portion of the line to which it had not extended before the union. It considered

the evident meaning of the law to be, that, whatever privileges and advantages either of the former companies possessed, should in like manner be held and possessed by the new company to the extent of the road which the said former companies had respectively occupied before the union; that it should stand in their place, and possess the power, rights and privileges they had severally enjoyed in the portions of the road which had previously belonged to them.

The case of Tomlinson vs. Branch, (15 Wall., 460) was a case, where a railroad company by its charter was granted an exemption for a limited period, and was afterwards merged in another railroad company, which became invested with all its property, rights and privileges; the latter company, in which the former was merged, possessed by its charter a perpetual exemption, but it was held, that the charter of the latter company did not extend to the property of the former so as to exempt it.

These cases show what former rights and privileges adhere to companies after consolidation, and they declare the law in conformity with the regulations provided for in the act of 1868.

In the present case none of the property, or the rights and privileges, of the branch railroad, is extended to, or possessed by, the road with which it is consolidated. For all practical purposes it is really and essentially a distinct and independent branch. The union exists simply in name, but not in substance.

An analysis of the act of 1868 abundantly shows this. The 2d section provides, that any railroad company desiring to construct a branch road may receive subscriptions, etc., for the construction of the branch railroad.

The costs and expenses of constructing and operating said branch railroad shall be kept separate from the business of the main line; they may borrow money, lease, sell or consolidate with any other railroad, distinct and separate from the main line. Section 3 provides, that any branch road so constructed shall not be holden for any debt, lien, or liability of the main

line, nor shall the main line be holden for any debt, lien, or liability of the branch; and the 4th section provides, that the stockholders in the branch have the same rights, as stockholders in the main line, in the choice of officers, but in all matters affecting the interests of the branch road the stockholders in the branch road shall control.

The branch road shall control the whole management, and is the only party interested. The Han. & St. Joe. R. R. Co., at the date of the act, was possessed of all the rights, privileges, immunities and franchises granted to the Kansas City, Galveston & Lake Superior R. R. Co. by the act of the 9th of February, 1857. This branch road commences and ends in the same places designated for the branch road in the original charter. It proposes nothing but what was intended to be accomplished by the act creating it, and its union with another company is in name only; no new powers are granted to either the branch or the company with which it is consolidated, and no original powers are taken away.

I see nothing that alters, affects or changes the power of the County Court to subscribe the stock. I think the power existed when the subscription was made, the same as it did when the act of incorporation of 1857 was passed.

In my opinion, therefore, the judgment should be reversed, and the petition dismissed.

Judges Napton and Adams concur; Judge Vories dissents, and Judge Sherwood did not sit.

Dissenting opinion of Vories, Judge.

I cannot concur in the opinion delivered in this case by the majority of my brother judges, and, owing to the importance of the questions involved, I deem it proper that I should state the grounds of my dissent. In order to a fair understanding of the subject, it will be most convenient for me to re-state the main facts appearing upon the record of the cause.

The action was brought by the State at the relation of the Attorney General to restrain by injunction the collection of a tax levied, and the further levy of any tax within Greene

county, for the purpose of paying either principal or interest on certain bonds issued to the Hannibal and St. Joseph Railroad Company to aid in the construction of what is called the Kansas City and Memphis Railroad. The defendants filed an answer to the petition for the injunction, in which they attempt to set up facts by which it is charged that the legality of the bonds appear. This answer was demurred to, and the demurrer sustained, and final judgment rendered restraining the defendant as prayed for by the plaintiff. From this judgment the defendants appealed to this court.

The allegations of the answer are substantially as follows:

That by an act of the General Assembly of the State of Missouri, approved February 9th 1857, the Kansas City, Galveston and Lake Superior Railroad Company was incorporated; that the corporators named in the act organized under said act and in said corporate name on the 11th day of May, 1857; that by the provisions of the act the Company was authorized to construct a branch railroad, commencing at or near Kansas City, and from thence to any point on the southern boundary of the State which the directors should select, to connect with any road or roads leading to or in the direction of Memphis, Tennessee, or Napoleon in the State of Arkansas; and that the County Courts of any county, through which any part of said railroad or its branches may be located, or of any county adjoining thereto, were authorized to subscribe to the stock of said Railroad Company, and issue bonds of such county to raise funds to pay the same; that on the 13th day of February, 1864, the General Assembly of the State, by an act amendatory of the before mentioned act, authorized said company to at any time change its name, and that the Board of Directors of said Company did afterwards, in the year 1864, change the name of said Company to the Kansas City and Cameron Railroad Company, which last named Company acquired thereby all of the rights, privileges and franchises which existed under the charter of the Kansas City, Galveston and Lake Superior Railroad Company; that by an act of the General Assembly of the State, approved

March 11th 1867, further to amend the said first named act of 1857, it was provided, that it should be lawful for the said Kansas City and Cameron Railroad Company to consolidate its said Company with any other railroad company on such terms as should be deemed just and proper; and that afterwards, in the year 1870, the said Kansas City and Cameron Railroad Company did consolidate with the Hannibal and St. Joseph Railroad Company, by virtue of which consolidation the Hannibal and St. Joseph Railroad Company became the owners of and possessed of all the rights, property, privileges and immunities which said Kansas City, Galveston and Lake Superior Railroad Company had by virtue of its charter and said acts amendatory thereof; that on the 3rd day of October, 1869, the Kansas City and Cameron Railroad Company, by a resolution adopted by the Board of Directors of said Company at a meeting held in Kansas City in pursuance of its by-laws, resolved, that the Kansas City and Cameron Railroad Company was desirous of availing itself of the provisions of the general laws of the State authorizing railroad companies to construct branch railroads, approved March 21st, 1868, and of the provisions of the charter of the Kansas City, Galveston and Lake Superior Railroad Company in relation to the construction of a branch railroad as specified in section 13 in said act, approved February 9th, 1857, as also by the acts amendatory thereof, and provided that the name of said branch railroad should be the Kansas City and Memphis Railroad, and that the same should commence at the city of Kansas in Jackson county, Missouri, to intersect with the main line thereat; thence to be built through the counties of Jackson and Cass in a generally southern direction to the southern boundary of the State in the direction of Memphis, Tennessee, as prescribed in section 13 of the charter of the Kansas City, Galveston and Lake Superior Railroad Company; that certain persons were appointed directors of said Kansas City and Memphis Railroad with full powers to take all needful steps to complete their own organization, to procure subscriptions of stock to said rail-

road, and for that purpose to open books for subscription of stock, and to do all other acts which the Kansas City and Cameron Railroad Company might or could lawfully do in relation to the building and operation of said branch railroad; that a duly certified copy of the proceedings of said Board of Directors of the Kansas City and Cameron Railroad Company was filed and duly recorded in the office of the Secretary of State. The answer of the defendants further states, that, after the Kansas City and Cameron Railroad Company had consolidated with the Hannibal and St. Joseph Railroad Company, the latter Company at a meeting of its Board of Directors regularly held ratified, confirmed and approved the resolutions passed by the Board of Directors of the Kansas City and Cameron Railroad Company, and then resolved that the said Hannibal and St. Joseph Railroad Company was desirous of continuing the work already begun on the said branch railroad, and was desirous of availing itself of the laws authorizing the building of branch railroads and especially the branch railroad known as the Kansas City and Memphis Railroad, and then authorized and empowered the Board of Directors of the Kansas City and Memphis Railroad to build said branch, and, to aid them in so doing and to empower them so to do, vested in and conferred on the Board of Directors of the Kansas City and Memphis Railroad all the powers and rights which the Hannibal and St. Joseph Railroad Company had under the law, and a committee was appointed as an executive construction and managing committee on behalf of the Hannibal and St. Joseph Railroad Company with full power to construct, manage and operate said branch railroad, and for that purpose to receive subscriptions and do all things needful which the Hannibal and St. Joseph Railroad Company might lawfully do under the laws of the State in the construction and use of said branch railroad; that a certified copy of the proceedings of the Board of Directors of the Hannibal and St. Joseph Railroad Company was filed and recorded in the office of the Secretary of State on the 5th day of July, 1870; that the

committee thus appointed did open books for the subscription of stock to the Hannibal and St. Joseph Railroad Company to aid in building and equipping the branch road of the Hannibal and St. Joseph Railroad, known as the Kansas City and Memphis Railroad, and that the County Court of Greene county subscribed the stock and issued the bonds now in controversy to the Hannibal and St. Joseph Railroad Company for the use of said branch road as aforesaid. The answer then avers, that the said bonds so issued have been sold to innocent purchasers, and that the road bed has been graded through Greene county.

The simple question, as I understand it, presented by the record in this case for the consideration of this court is, whether the County Court of Greene county under the circumstances detailed in the answer of the defendants had the power to subscribe the stock subscribed and issue the bonds which were issued and which are brought in question in this suit. For the purpose of considering the points arising, it may be admitted, that by the charter of the Kansas City, Galveston and Lake Superior Railroad Company counties, through which and adjoining which said railroad to be built by said Company and its branches were located, had the power conferred on their several County Courts to subscribe to the capital stock of said Company without having first taken the vote of the qualified voters of such counties, and to issue the bonds of the County in payment for the stock subscribed. And whatever different opinion might be entertained if the question were a new one, it is now also settled by numerous decisions of this court, that the privilege, given to counties to subscribe for stock in railroad companies without any vote of the people by special railroad charters before the adoption of our present constitution, was not repealed by the constitution. In other words, that the provisions of the constitution, prohibiting the Legislature from giving any power to counties to subscribe stock in a Railroad Company without the consent of two-thirds of the qualified voters of the county, &c., only operated on prospective legislation, and did not affect special railroad charters already passed.

These questions have nothing to do with this case, the important question being, whether the privilege granted to counties to subscribe for stock in the Kansas City, Galveston and Lake Superior Railroad Company, or after the change of name of said corporation to the Kansas City and Cameron Railroad Company, would authorize Greene county to subscribe for the stock of the Hannibal and St. Joseph Railroad Company for the use and benefit of the Kansas City and Memphis Railroad, or more properly to subscribe for the stock of the Kansas City and Memphis Railroad Company, which is also called a branch of the Hannibal and St. Joseph Railroad Company, by nominally subscribing to the stock of the last named Company for the use of the supposed branch road?

In the consideration of this question it is not necessary to notice any action of the Kansas City and Cameron Railroad Company in reference to their intention to build a branch road under the act of 1868, for it is not pretended, that that Company has built, or is constructing, a branch road or any other road in which stock has been subscribed; nor is it contended, that Greene county has ever subscribed stock to said Company, either in the name of the Kansas City, Galveston and Lake Superior Railroad Company, or in the name of the Kansas City and Cameron Railroad Company after it assumed that name. What is pretended by the answer of the defendants is, that after the consolidation of the Kansas City and Cameron Railroad Company with the Hannibal and St. Joseph Railroad Company, and said last named Company had become possessed of all of the property, rights, privileges and franchises of the Kansas City and Cameron Railroad Company, the Hannibal and St. Joseph Railroad Company, being desirous to avail itself of the privileges conferred by the act of the Legislature of the State in reference to the construction of branch railroads, approved March 21st, 1868, adopted the proceedings before had on said subject as its own, and proceeded to open books for the subscription of stock to said branch road called the Kansas City and Memphis Railroad,

and otherwise complied with the law on said subject, and filed a certified copy of its proceedings on the subject with the Secretary of State as is required by law.

The proceedings from this on were conducted wholly by and in the name of the Han. & St. Joe. R. R. Co., and it was in this branch road so being constructed by the Han. & St. Joe. R. R. Co. that Greene County subscribed stock, which was nominally subscribed to the Han. & St. Joe. R. R. Co. for the use of said branch road. By the act of 1868, under which this branch road was being constructed, it is provided by the 1st. section, that "any railroad company in this State, authorized by law to build branches and wishing to avail themselves of the provisions of this act, shall by its Board of Directors pass and cause to be entered upon its records a resolution setting forth such desire and designating the name under which such branch shall be built, its point of intersection with its main line and general course; a certified copy of which resolution shall be filed with the Secretary of State, after which they shall be governed by the provisions of this act." This section, as before stated, the answer charges was complied with by the Han. & St. Joe. R. R. Co., and I suppose it makes no difference in this case, that it is known that the point of intersection named is not within fifty miles of the line of the main road. By the second section of the act it is provided, that "whenever any such railroad company shall undertake the construction of a branch designated as provided in the first section of this act they shall receive donations or subscriptions to stock to aid in its construction in the name of such branch, which shall be expressed in the certificate of stock issued; the cost and expenses of constructing and operating such branch shall be kept separate and distinct from expenses on the main line. They may borrow money, and issue bonds secured by mortgage on such branch road, to aid in its construction, and in general may operate, lease, sell or consolidate with any connecting road distinct and separate from their main line, and in any other way may manage or dispose of such branch as by law they may be authorized, with-

out reference to their main line and separate therefrom." It is provided by the third section of said act, that "any branch road so constructed shall not be holden for any debt, lien or liability of the main line, nor shall the main line be holden for any debt, lien or liability of such branch. Any dividends of profits arising out of the business of such branch road shall be divided among the stockholders in said branch, and in all respects the interests of the stockholders in the branch shall be kept separate and distinct from the interest of the stockholders in the main line." The fourth and last section provides, that "the holders of stock in any railroad company which was subscribed in aid of the construction of a branch road according to the provisions of this act, shall have the same rights as other stockholders in the company in the choice of officers; but in all matters directly and specially affecting the interests of such branch road the stockholders in such branch shall control, and for such purpose the directors under the by-laws may, or on the petition of parties representing one-tenth of such stock shall, call a meeting of the stockholders in such branch setting forth the object of such meeting; and at any such meeting such stockholders may instruct the Board of Directors in all matters relating, especially to their interests, and they shall be governed by such instructions if not inconsistent with the laws of the State and the powers of said company.

Now, as before stated, the stock in question, for which the bonds were issued, the collection of which has been enjoined in this suit, was subscribed to the Han. & St. Joe. R. R. Co. for the use of this branch road being constructed by said Han. & St. Joe. Co. under the act of 1868 above set forth. The question is, by what authority the County Court of Greene County has subscribed this stock. It is not pretended, that the county or the County Court had any inherent power to make the subscription; but it is contended, that by the 13th section of the act to incorporate the Kansas City, Galveston & Lake Superior R. R. Co. it is provided, that said company shall have power to construct a branch railroad, commencing

at or near the City of Kansas and from thence to any point on the southern boundary of the State that the Directors may select, etc., and that the fifteenth section of said act makes it lawful for the County Court of any county in which any part of the route of said railroad or branches may be situate, or any county adjacent thereto, to subscribe to the stock of said company, etc., and that said counties might issue bonds without submitting said question to the vote of the qualified voters of the counties as is required by the present Constitution of this State.

This may all be conceded, but the difficulty in the case is not thereby removed, because it is not pretended that Greene County has subscribed to the stock of the Kansas City, Galveston & Lake Superior R. R. Co., or to any branch thereof, or that said company has ever constructed any branch road through or adjacent to Greene County or elsewhere, but, on the contrary, it is stated in the answer of the defendants that by an amendatory act, passed by the General Assembly and approved on the 11th day of March, 1867, it was provided, that it should be competent for the Kansas City & Cameron R. R. Co. (that being the changed name of the Kansas City & Galveston R. R. Co.,) to consolidate their said Railroad Co. with any other railroad company on such terms as should be deemed just and proper, and that afterwards, in the year 1870, the said Kansas City & Cameron R. R. Co. did consolidate with the Han. & St. Joe. R. R. Co., *by virtue of which* consolidation the Han. & St. Joe. R. R. Co. became the owner of, and possessed of, all the rights, property, privileges, immunities *and franchises* which the Kansas City, Galveston & Lake Superior R. R. Co. had by virtue of its charter and the acts amendatory thereof. This is the last that we ever hear of the Kansas City, Galveston & Lake Superior R. R. Co. Its whole existence, property, privileges, rights and franchises under its charter were transferred to, and became possessed by, the Han. & St. Joe. R. R. Co.; it had not, up to that time, constructed a single rod of railroad either of main line or branch road, and of course could do nothing in a corporate

capacity after its entire powers and rights were transferred to, and possessed by, the Han. & St. Joe. R. R. Co. It is, however, contended, that, after the consolidation (or what is called the consolidation, for the Kansas City, Galveston & Lake Superior R. R. Co. had no road in fact to consolidate) with the Han. & St. Joe. R. R. Co., the power or privilege to subscribe stock by the counties in or to the capital stock of the Kansas City, Galveston & Lake Superior R. R. Co. was transferred to, and became vested in, the Han. & St. Joe. R. R. Co., and that the County Court of Greene County by virtue of such transfer became invested with power to subscribe to the capital stock of the Han. & St. Joe. R. R. Co., just in the same manner and to the same extent that it had, before the transfer, been authorized to subscribe to the stock of the Kansas City, Galveston & Lake Superior R. R. Co. I cannot assent to this assumption. I do not believe that a power given to a county to subscribe to the stock of a specific railroad enterprise will authorize the county to subscribe to the stock of a wholly different company with a different enterprise in view, with which the former company may have become consolidated, or may have transferred its corporate rights, unless the consolidation or transfer was contemplated by the original charter of the company, or provided for by the general law. In the case under consideration the consolidation was neither provided for by the charter of 1857 nor by the general law; but the act authorizing the consolidation was not passed until the 11th of March, 1867, more than two years after the adoption of our present Constitution which expressly prohibits the legislature from authorizing any county to subscribe stock to a railroad company without the previous assent of two-thirds of the qualified voters of the county. It may be, that where the stock is subscribed in the original company, and the company afterwards consolidated with another company, that the county would become a stockholder in the consolidated company, but no subscription could be made by the county to the consolidated company under a power to subscribe to one of the companies consolidated. This question is fully discussed,

and the authorities referred to, in a late case decided in the Supreme Court of the United States, not yet published, but to be found in "The Central Law Journal" of March 26th, 1874. In that case, the subscription of stock in question was held to be valid on the express ground, that it had been contracted before the consolidation, and was made to the original company, and the consolidation was authorized by the original charter, which also authorized the subscription of stock. But that question, although I think it is conclusive, need not be discussed or relied on in this case, as it is not pretended that Greene County has in any legal or rational sense subscribed to the stock of the Han. & St. Joe. R. R. Co. Greene County, by the subscription of stock in question, has not obtained a particle of interest in the capital stock of either the Han. & St. Joe. R. R. Co., or the Kansas City, Galveston & Lake Superior R. R. Co., nor has either of said railroad companies acquired the least amount of beneficial interest either in the stock subscribed by Greene County or in the road to be constructed therewith. But, on the contrary, the stock subscribed by Greene County is subscribed for the use of an independent organization of stockholders for the purpose of constructing an independent road called a branch road, and known as the Kansas City & Memphis R. R., which is being constructed under the act of 1868 before quoted. It cannot be pretended, that this branch road is being constructed by either the Kansas City, Galveston & Lake Superior R. R. Co. under its charter, or by the Han. & St. Joe. R. R. Co. under the same charter; but the record shows, that the road is being constructed, and the stock subscribed, under the provisions of the act of 1868 before quoted, and that act provides, that, after its provisions are accepted, the branch road must be constructed under and be governed by its provisions; hence we must necessarily look to its provisions to find the power, if there be any power, in Greene County to subscribe the stock in question. When we refer to the provisions of that act, as they have been hereinbefore quoted, it will be seen, that a branch road constructed under its provisions is just as

much an independent road and organization as if it was constructed under an independent charter for the construction of a road in a totally different part of the State. The corporation to which the county was authorized to subscribe stock, and the association of stockholders constructing this branch, are radically and fundamentally different in reference to their objects and the ends for which they were created. The only connection between this road called a "branch" and the main line is, that the directors of the Hannibal road are made the agents of the stockholders of the branch road for the purpose of enabling them to construct their road without having a separate act of incorporation, and thus to transact their business through the directors of the Hannibal & St. Joe. R. R. Co.; but still these directors, it will be seen by the last section of the act, are under the ultimate control of the stockholders of the branch road so far as its interests are concerned. The main or original corporation has no interest in the branch road, and is not responsible for its debts, and cannot be made to bear any of its burdens. And the branch road and its stockholders have no interest in the main line or original corporation either as stockholders or otherwise, and are not responsible for its acts or liabilities. It therefore seems to me to be clear, that the provisions of the charter of the Kansas City, Galveston & Lake Superior R. R. Co., authorizing counties to subscribe for the capital stock of that company, could not be tortured into an authority to take stock in this independent and wholly dissimilar organization, with which it has no connection or interest, and that it makes no difference that the original charter of the Kansas City, Galveston & Lake Superior R. R. Co. authorized it to construct a branch thereof through the same county where this independent road is to be located. If the subscription of stock had been made under the original charter and to the original company, the county of Greene would have acquired an interest in the capital stock of both the main line and all the branches constructed under its charter, which is a very different thing from the interest of a stockholder in this branch road to be constructed under the act of 1868.

This case is infinitely stronger than that of Marsh vs. Fulton County, 10 Wallace, 676. In that case a subscription was authorized, by a vote of the people of Fulton County, to the stock of the Mississippi and Wabash Railroad Company, and under such authority the supervisors ordered the clerk to make the subscription. After the vote giving the authority, and before the subscription was made, the legislature of the State of Illinois changed the character of the company, separated the road into three divisions, authorizing the stockholders in each division to elect separate Boards of Directors for the management of their own division. After this action of the Legislature, the clerk made the subscription to the central division, that being the division of the road passing through Fulton County. The court decided, that this was a different enterprise from the one to whose stock the Board of Supervisors, under the authority of the election, had ordered the Clerk to subscribe, and that the subscription so made and the bonds issued in payment thereof were absolutely void, and this in the hands of a purchaser for value.

As before stated, the case under consideration is a much stronger case than that, and yet this court in the case of The State to the use of Neal vs. Saline County (48 Mo., 390) refers to and fully approves the decision in the case of Marsh vs. Fulton County, the learned Judge, delivering the opinion of the court, using this language: "The opinion is a clear one and contradicts in effect the *dicta* of the judges in several of the other cases, and places the validity of county bonds upon satisfactory grounds. * * * * * It was a case where the people had authorized a subscription to the capital stock of one company, and no authority whatever was given to subscribe to that of another—an absence of authority and not an irregularity in granting it." In a later case, decided by this court, the case of Marsh vs. Fulton County was again brought under review, and was fully and unreservedly approved. Judge Wagner, in delivering the opinion of the court in that case, uses this language: "The people authorized the subscription to be made to the capital stock of one company, and the clerk made the

subscription to the stock of another company. This he had no power to do." (Ranney vs. Baeder, 50 Mo., 600.)

It will be observed in the case of Marsh vs. Fulton County, before referred to, and which is so fully approved by this court on two different occasions, the route of the road was not changed, the road remained the same, but the corporation was divided into three Boards of Directors, each having control of different parts of the road, and Fulton County, by the subscription of stock made, only acquired an interest in one division. The principle in that case and the one under consideration are identical; but the present case is much stronger and more marked in its facts. It seems to me, that after the decisions of this court just referred to, in which the case of Marsh vs. Fulton County was so fully approved, there ought to have been no doubt entertained in reference to the present case. At least it is clear to my mind, both from the authorities referred to and upon principle, that the subscription of stock made by Greene County, and the bonds issued in payment thereof, were made and issued without authority and are wholly void. It is, however, claimed by the counsel for the defendants, that the statute of 1868, before set out in this opinion, is an enabling and amendatory act, and that as such it took up the power to subscribe for general stock, as conferred by the charter of the Kansas City, Galveston and Lake Superior Railroad Company, and imported it into said act of 1868, by which the power to subscribe for general stock in said last named railroad company was enlarged and extended into a special power to subscribe for special stock in the branch road proposed to be constructed under the provisions of the act of 1868. I do not think that the act of 1868 admits of any such construction; but if it be so construed, it is clear that said act would be in palpable violation of the provisions of the Constitution in force at the time, by which the general assembly is prohibited from passing any law to confer power on a county to subscribe for stock in a railroad company without the previous sanction of at least two-thirds of the qualified voters of such county. The subscription under consideration,

not having been submitted to the voters of that county for their assent, was, therefore, made without authority of law and in violation of the Constitution of the State, and is, for that reason, void.

It is also stated in the answer of the defendants, that the bonds issued by the County Court of Greene County, the collection of which is sought to be enjoined by this action, have been sold to innocent purchasers, who now hold the same. It is said by a majority of the court in the opinion delivered in this case, that the fact, that the bonds have been negotiated and sold, need not be considered as the bondholders were not before the court. It may be true, and is true, that, with the view taken in the opinion delivered in the case, it was not requisite, after it had been held that the bonds were issued by authority of law and were valid bonds, to further inquire into the question of their negotiability. But if, as I think, the bonds were issued without authority and were, therefore, void, then, if it were possible that such void bonds could be made binding obligations in the hands of what are called innocent purchasers, I cannot see why the defendants might not set up such fact as a defense to an action brought to enjoin the county officials from collecting taxes to pay the bonds or interest thereon, which, upon such assumption, the county would be bound to pay. There could, in such case, be no necessity for the presence of the bondholders; the answer charges, that the bonds have passed into the hands of innocent purchasers, which fact, if material, is admitted by the demurrer. The question then to be considered is, whether, in the nature of things and the meaning of the law, there can be such a thing as an innocent purchaser or holder of a bond issued or made by the County Court of a county without any authority of law, or when a county bond, which is void when issued for the want of any power in the county to issue the same, can be validated and turned into a valid obligation by a transfer of the same to what is called an innocent purchaser? It seems to me, that if this question were a new one, and had not been mystified and brought into doubt by the decisions of some of the

respectable courts of the country, there could be no difficulty in its solution. It is, I think, conceded by all, and has so been held by the courts, that a county or other municipal corporation has no inherent right of legislation, and cannot subscribe for stock in any public improvement, unless authority is given to it so to do by the legislature, and where such legislation is not restrained by the Constitution of the State; that such municipalities can only act in such cases by legally delegated authority. (Thomson vs. Lee County, 3 Wall., 327.) By the 14th section of the 11th article of our Constitution, adopted in the year 1865, it is provided, that "the General Assembly shall not authorize any county, city, or town to become a stockholder in, or to loan its credit to, any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto."

I think that I have before succeeded in showing, that the bonds made by Greene county were made in aid of an association of stockholders, who were to construct a branch railroad under the act of 1868, in which no incorporated railroad company had any interest, except as the directors of the Hannibal & St. Joseph Railroad Company were made the agents of said association for the convenient transaction of the business of said association, and it is not pretended that any vote of the qualified voters of Greene County was ever taken by which they could assent to the subscription of the stock or the issuing of the bonds in question. Now as every person is bound to take notice of the Constitution of the State and the law of the land, how is it possible that there could be an innocent purchaser of these bonds within the meaning of the law in reference to innocent purchasers without notice? We are not without authority on this subject, and, for the purpose of making myself understood on the subject, I will refer to a few of the leading cases, and will quote from the language of some of the able judges, who delivered the opinions, which present the question more clearly than I could by any language of my own.

In the case of Marsh vs. Fulton County (10 Wall., 676), before referred to to illustrate other points in the case, the learned Judge, in delivering the opinion of the court, in discussing the exact point now under consideration uses the following clear and conclusive language: "A subscription to a company, whose charter provides for a continuous line of railroad of two hundred and thirty miles across the entire State, was voted by the electors of Fulton County, not a subscription to a company whose line of road was less than sixty miles in ex tent and which, disconnected with the other portions of the original line, would be of comparatively little value. But it is earnestly contended, that the plaintiff was an innocent purchaser of the bonds without notice of their invalidity. If such were the fact, we do not see how it could affect the liability of the county of Fulton. This is not a case where the party executing the instrument possessed a general capacity to contract, and where the instruments might, for such reason, be taken without special inquiry into their validity. It is a case, where the power to contract never existed—where the instrument, with equal authority, might have been issued by any other citizen of the county. It was a case, too, where the holder was bound to look to the action of the officers of the county, and ascertain whether the law had been so far followed by them as to justify the issuance of the bonds. The authority to contract must exist before any protection as an innocent purchaser can be claimed. This is the law, even as affects commercial paper alleged to have been issued under delegated authority."

This same doctrine is upheld in the case of the Supervisors, of Fulton county vs. The Mississippi and Wabash Railroad Company, (21 Ill., 338).

It will be seen, that the decisions in these cases turned entirely on the question of power. The doctrine, and the reason of the cases, is, that, where the power exists in the party or corporation to issue the bonds, and they are accordingly issued and pass into circulation and into the bonds of innocent purchasers for value, such holder can recover, notwithstanding

any mere irregularity in the issuing of the bonds or any defect in the consideration thereof. But in cases of municipal corporations having no inherent power to issue bonds, and none has been delegated to them to do so, that then all persons, who purchase such securities, do so at their peril and are not protected as innocent purchasers. Such purchasers are bound to know the law, and see that the power has been delegated, and that the law delegating the power has been substantially complied with. Innocent purchasers are protected on the ground, that there is some defect or infirmity in the paper purchased of which they had no notice. If they have notice of the defect, they are not protected. This reason can never apply where the defect consists in a want of power in a corporation to do the act or execute the instrument. Such defects do not consist in matters of fact of which a party must have notice, but in matters of law of which all must take notice at their peril. It is like a question of jurisdiction, which can always and under all circumstances be insisted on.

The same question involved in this case was fully and ably considered in the case of The Floyd acceptances (7 Wall., 666.) There the acceptances consisted of drafts drawn by Russell, Majors and Waddell on account of their contract with the Government for supplies for the army. The drafts were drawn in advance, or in anticipation of the supplies to be furnished, and made payable to the order of the drawers, and accepted by Floyd, Secretary of War. They were afterwards indorsed for value by the payees. It was contended, that the Secretary of War had a right to issue the acceptances in payment of indebtedness by the Government, and that it was the custom of the officers of the Government to pay off demands against the Government in that way, and that, when such drafts were transferred in the usual course of trade to innocent purchasers for value, in such hands the consideration could not be inquired into. The case was elaborately considered and examined by the Supreme Court of the United States, and in an able opinion delivered by Justice Miller,

after conceding that the instruments were negotiable in form, he proceeded to say: "In the case of such paper issued by an individual, when we make ourselves sure of his signature we are sure that he is bound, because the right to make such paper belongs to all men. But the Government is an abstract entity, which has no hand to write, or mouth to speak, and has no signature which can be recognized as in the case of an individual. It speaks and acts only through agents or more properly officers. These are many, and have various and divers powers confided to them. An individual may, instead of signing with his own hand the notes and bills which he issues or accepts, appoint an agent to do these things for him. And his appointment may be a general power to draw or accept in all cases as fully as the principal could, or it may be a limited authority to draw or accept under given circumstances defined in the instrument which confers the power. But in each case the person dealing with the agent, knowing that he acts only by delegated power, must at his peril see that the power on which he relies comes within the power under which the agent acts, and this applies to every person who takes the paper afterwards, for it is to be kept in mind that the protection, which commercial usages throw around negotiable paper, cannot be used to establish the authority by which it was originally issued. These principles are well established in regard to the transactions of individuals. They are equally applicable to those of the Government. Whenever negotiable paper is found in the market, purporting to bind the Government, it must necessarily be by the signature of an officer of the Government, and the purchaser of such paper, whether the first holder or another, must at his peril see that the officer had authority to bind the Government."

The foregoing reasoning of Judge Miller, which, I think, is incontrovertibly the law, is in all its force and bearing applicable to the bonds issued by a County Court under the Constitution and laws of this State. The county like the Government is an abstract entity, having neither hands to write, nor mouth to speak, and has no signature that can be

recognized. It speaks and acts only through agents, and can only act by or through delegated authority, and can issue no bonds unless it is authorized by the constitution and laws of the State to do so. Every person being bound to take notice of the law, each person who deals with the county through the County Court, knowing that it acts only by delegated authority, must at his peril see that the paper purchased, and on which he relies, comes within the terms of the power delegated, and this whether he is the original holder or a subsequent purchaser. "The protection thrown around commercial paper" cannot be used to establish the authority by which it is issued. It must be borne in mind, that in cases of the kind here referred to the paper is not declared bad by virtue of any extrinsic fact affecting the consideration or fairness of the transaction, but it grows out of a want of power to execute the bond, or to make the contract, by the agency employed, and hence it seems to me to be irrational to talk about an innocent purchaser without notice. Everybody is bound to take notice of the law, and the law, as I think, is and always has been, that as to such agencies, where it is known that they can only act by delegated authority, everybody dealing in paper purporting to have been executed by them must at his peril see that the power has been delegated and substantially complied with. (Sto. Agency, § 307*a*.)

I might refer to a number of analogous cases, where the same principle involved in the case before referred to was fully discussed and uniformly settled in the same way. In the case of The Schooner Freeman vs. Buckingham (18 How., 182;) the question was as to the validity of certain bills of lading issued by the master of the vessel as against the owners. The bills had been signed and issued by the master for goods which were really not on board the vessel. Judge Curtis, in delivering the opinion of the court, states the law as follows:

"If the signer of a bill of lading was not the master of the vessel, no one would suppose the vessel bound, and the reason is because the bill is signed by one not in privity with the

owner. But the same reason applies to a signature made by a master out of the course of his employment. The taker assumes the risk, not only of the genuineness of the signature and of the fact that the signer was master of the vessel, but also of the apparent authority of the master to issue the bill of lading. We say the apparent authority, because any secret instructions by the owner, inconsistent with the authority with which the master appears to be clothed, would not affect third persons. But the master of a vessel has no more apparent unlimited authority to sign bills of lading than he has to sign bills of sale of the ship. He has an apparent authority, if the ship be a general one, to sign bills of lading for cargo actually shipped, and he has also authority to sign bills of sale of the ship when in case of disaster his power of sale arises. But an authority in each case arises out of, and depends upon, a particular state of facts. It is not an unlimited authority in the one case more than in the other, and his act in either case does not bind the owner even in favor of an innocent purchaser, if the facts on which his power depends did not exist, and it is incumbent upon those, who are about to change their condition upon the faith of his authority, to ascertain the existence of all the facts upon which his authority depends."

This case is referred to, quoted from, and fully approved in the late case decided by this court of the Louisiana National Bank vs. Laveille (52 Mo., 380), in which case it was held, that a bill of lading, issued by a general agent of a vessel for said purpose, but for goods not on board the vessel, was void as to the owner even in the hands of an innocent purchaser for value, although the bill itself recited the fact that the goods were on board the vessel. Numerous other cases might be cited, both in this country and in England, to the same effect. The ground, upon which all of these decisions are based, is, that the particular circumstances did not exist which were necessary to the lawful exercise of the power by the agency attempting to do the act.

I know that there have been a number of recent decisions

made by the Supreme Court of the United States, in which the court has, with an apparent desire to uphold railroad bonds and bonds issued in the aid of other public improvements (in what seems to me to be a disregard of all of the well settled law governing such agencies in other cases), held, where bonds are issued by a County Court, which county has under any circumstances the authority to issue bonds, and it is recited in the bonds (no matter how false or fraudulent the recital may be) that the circumstances exist necessary to the exercise of the power, that such bonds will be valid, and the false recitals cannot be disputed when the bonds are in the hands of what the court denominates an innocent purchaser. In other words, that a purchaser may blindly rely on these false recitals in the bond, and, if he does so, the recitals cannot be disputed as to such purchaser. It is to be observed, that the bonds issued by Greene County now in question had no recitals in them not stated in the defendants' answer, and, if they had, it could make no difference in the case.

It is not difficult to see, that such decisions entirely defeat and dissipate the provisions of our Constitution. The Constition provides, that neither the Legislature nor the county courts of the different counties, nor both combined, shall have power to subscribe to the stock of railroads or other public corporations on the part of the counties, or issue bonds therefor, or otherwise loan the credit of the counties for such purposes. And yet, if we are to take these decisions as law in this State, the judges of county courts may defy the Constitution of the State, subscribe to the stock of railroad companies at pleasure, issue the bonds of the county in payment of the stock subscribed without the assent of the qualified voters required by the Constitution, and transfer the bonds so issued, without authority and in defiance of the constitution, by merely reciting a falsehood in the body of the bond. If this can be done, I ask of what avail is it for the people of a State to attempt to guard their rights by constitutional restrictions? It is, however, worthy of remark, that the most if not all of these recent decisions were made by a divided court, and have never been

recognized as law by the court of last resort in this State since the adoption of our present Constitution. The decisions of this court, made since the adoption of our present Constitution, wherever this question has come under consideration, I believe, have been uniform in holding, where bonds were issued by county courts without a substantial compliance with the law, or in violation of the prohibitions of the Constitution, that such bonds are void, no matter in whose hands they may be found.

The first case in this court, where the question involved was discussed since the adoption of our present Constitution, is the case of Steines vs. Franklin County (48 Mo., 167). In that case all of the authorities on the subject were carefully reviewed, after which it was held by the court, that bonds issued without a vote of the people, where it is required by law, are void in whose hands soever they may be found, and that it is a question of power which must be conferred by a vote of the people, and, like a question of jurisdiction, can always be relied on under all circumstances. The case of Flagg vs. Palmyra was commented on and disapproved.

The next case involving the same question, which came before this court, is the case of the State vs. The Saline County Court (48 Mo., 390.) In that case the case of Marsh vs. Fulton County, 10 Wall. hereinbefore referred to, is commented on and fully approved. The next case, where the question was considered, is the case of the State vs. The Saline County Court (51 Mo., 350), where it is held, that, since the adoption of the new Constitution, no bonds can be authorized without the vote of the people, and, if issued without such authority, they are void. The next case coming before this court is the case of Carpenter vs. The Town of Lathrop (51 Mo., 483), where the subject was again fully discussed, after which it was held by a full court, that the vote of the people must be obtained at an election authorized by law, or that no power was conferred on the town authorities to issue the bonds, and that bonds, issued without a substantial compliance with the Constitution and law, would be absolutely void, and that the recitals in the bonds were not conclusive on any one.

The only remaining case, in which the question involved in this case came under consideration, is the case of Smith vs. Clark County (*ante* p. 58.) In that case the learned Judge, delivering the opinion of the court, did, in his opinion, discuss the recent decisions of the Supreme Court of the United States, in which it is held that the recitals in a county bond are conclusive on the inhabitants of the county where the bonds were in the hands of innocent purchasers, and gave those decisions his approval. But the case itself was decided on a different point, and that point was not necessarily involved in the decision of the case, and, in an explanatory opinion filed by Judge Adams upon a motion for a re-hearing, the doctrine that the recitals of the bonds were conclusive was repudiated in the following explicit language: "It was not necessary to decide, that the recitals in the bonds issued by the County Court to the railroad company were conclusive or amounted to an estoppel. In my judgment and in the judgment of a majority of the court, they do not amount to an estoppel. Although that is the settled doctrine of the Supreme Court of the United States, it has not been sanctioned here so as to make it a rule of decision in this State." In this explanatory opinion of Judge Adams the majority of the judges of this court concurred. So that it will be seen, that this court has, ever since the adoption of our present Constitution, constantly repudiated the idea, that the false recitals in a bond, purporting to have been issued by a county court, would conclude the county or the tax-payers from denying such recitals. And, may I not ask, in either reason or justice, should our decisions have been otherwise?

The people of this State have notified the whole world by the provisions of their Constitution, that they will not be responsible for the payment of bonds issued by the County Court of a county, or otherwise on behalf of a county, unless the previous assent of the qualified voters of the county shall have been obtained in the manner pointed out in the Constitution. Persons who purchase such securities are bound to take notice of this constitutional provision. But men can be found, who,

when they find such securities on the market, in place of informing themselves as to whether authority has been conferred upon the agency, by which the bond purports to have been executed, to execute the same, voluntarily elect to recklessly rely upon false recitals in the bond, which recitals, as well as the bond, are made by one who had no authority to make them. Who in such case is the innocent party, the purchaser of the bond, or the tax-payer who is asked to pay it? I know of no rule of either law or ethics which would require one to say that it is not the tax-payer. I apprehend, that the assumption that the purchaser of a bond under such circumstances is an innocent purchaser of the bond within the meaning of the law, and the county or tax-payers thereof estopped from denying the recitals of the bonds, though falsely made, is not only opposed to the well-settled law on the subject of such agencies, as well as against the reason of the case, but, when the question shall be impartially examined, it will be found that such an assumption is as void of justice as it is deficient in reason.

In my opinion, the judgment of the Circuit Court ought to have been affirmed.

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GABRIEL VOGLER, Respondent, *vs.* JOHN MONTGOMERY, *et al.*, Appellants.

1. *Sheriff's sale—Purchase at by party to judgment—By stranger—Reversal of judgment—Effect of.*—Where plaintiff in a judgment purchases at the execution sale, his title will be forfeited by a subsequent reversal of the cause. (See Holland *vs.* Adair, v.55.) But the title of a stranger, who purchases in good faith from said plaintiff in the judgment, and before the reversal of the same, will not be invalidated by such reversal.

2. *Homestead exemption—Construction of statute.—Claim not made by house keeper—Fraudulent conveyance by.*—Under § 2 of the act concerning Homesteads, (Wagn. Stat., 697.) where a homestead is claimed, the sheriff cannot proceed with his levy until he has ascertained by appraisers in the mode directed by the act, the extent and value of the premises, and that they are beyond the limit protected against executions. And the claim is not lost when not

asserted by the housekeeper or head of the family, or by reason of the fact that he had theretofore fraudulently conveyed away the property.

3. *Injunction—Cloud on title, etc.*—Injunction will lie to restrain the sale of land where a cloud would be thereby thrown upon the title of plaintiff in the injunction, although no title would in fact pass to the purchaser at the sale.

*Appeal from Pettis Court of Common Pleas.*

***Philips & Vest and John Montgomery, Jr.***, for Appellants.

I. Shields was an innocent purchaser for a valuable consideration and the subsequent reversal of the judgment, whatever may have been its effect as between the plaintiff and defendant therein, in nowise affected the rights acquired by Shields, under his deed of trust. (Gott vs. Powell, 41 Mo. 420; Shields vs. Powers, 29 Mo., 317; Voorhes vs. Bank of U. S., 10 Peters, 475; Coleman vs. McAnnulty, 16 Mo., 173; Fithian vs. Monks, 43 Mo., 520 and 521; McNair vs. Biddle, 8 Mo., 257-268.)

II. The petition while it asks a court of equity to interfere for the protection of the petitioner against a threatened sale of his property, distinctly and repeatedly avers that the trustee has not even any such legal title as would authorize him to sell, and that no title whatever would pass by his sale, This being true, all past ground or pretext for the interposition of a court of chancery is taken away, and the naked allegation that a cloud would be cast over his title by such sale gives no strength to a petition that is already shown to be causeless. (Kuhn vs. McNeil, 47 Mo., 389; Drake vs. Jones, 27 Mo., 428, 431, 432; Janney vs. Spedden, 38 Mo., 395; City of St. Louis vs. Goode, 21 Mo., 216; Hopkins vs. Lovell 47 Mo., 102-3.)

III. The remedy by injunction does not lie to restrain a sale by a trustee in such case. (City of St. Louis vs. Goode, 21 Mo., 216; Drake vs. Jones, 27 Mo., 428,-431, 432; Hill. Inj., 23-38.)

IV. Even if Vogler had been entitled to a homestead in the premises, he could not on that account, restrain the sale under the deed of trust. The mode for designating and secur-

ing a homestead is prescribed and pointed out by statute, and if the sheriff after notice as alleged in the petition proceeded to sell notwithstanding, the injury was completed and injunction could not remedy the hurt; and if injury in fact were done him in the sale of his homestead, he had ample remedy therefor at law. But under the proof in this case, at the time of the sale by the sheriff under the first deed, the plaintiff was not entitled to any homestead in the property in controversy; because the fee title to said estate was then vested in Henry Suess by virtue of his deed from Vogler; and whatever right Nussberger acquired by said sheriff's deed passed to and vested in Shields by virtue of the deed of trust. If the conveyance by Vogler to Suess was *bona fide* and for a valuable consideration, Nussberger got nothing by his said first deed. If on the other hand the said conveyances to Suess were fraudulent and feigned as against Nussberger, he acquired an equity by his said purchase and deed which enured to the benefit of said Shields by virtue of the deed of trust; and in either case, Vogler would have no right to enjoin the sale by the trustee under said deed of trust. (Hopkins vs. Lovell, 47 Mo., 102; City of St. Louis vs. Goode, 21 Mo., 216-218.)

V. The beneficiary in the trust deed occupies the same relation under his deed of trust as if Nussberger had conveyed to him absolutely by deed; and in such case whilst Vogler, after the reversal by the District Court, would be entitled as against Nussberger, to be re-instated in whatever he had lost by reason of such irregular judgment and sale, yet Shields would hold the property unaffected by such reversal. (Lovell vs. German Reformed Church, 12 Barb., 67, 83; Newton & Clark, Exec. vs. McLean, 41 Barb., 285; Wood vs. Bank of Ky., 5 Monroe, 194; Clark vs. Hunt, 3 J. J. Marsh., 554; Bayley vs. Greenleaf, 7 Wheat, 47; Frisbee vs. Thayer, 25 Wend., 398; Washb., Real Prop. p. 89, 90. Vol. 1.)

*Johnson & Botsford*, for Respondent.

I. A sheriff's sale and deed of a homestead are void, (Beecher vs. Boldy, 7 Mich., 506; Hamblin vs. Warnecke, 31 Tex.

91; Kendall vs. Clark, 10 Cal., 17; Ackley vs. Chamberlin, 16 Cal., 181;) and the sale cannot be sustained on the ground, that the homestead exceeds the amount in value limited by law. (Meyers vs. Ford, 22 Wis., 139; Cook vs. McChristian, 4 Cal., 23.)

II. The possession by respondent and his family of the land in controversy was notice to all persons of his homestead right. (Cook vs. McChristian, 4 Cal., 23; Taylor vs. Hargous, *Ib.*, 268; Holden vs. Pinney, 6 Cal., 234); and no act on his part was necessary to secure such right. (Wagn. Stat., p. 697, § 1; Pardee vs. Lindley 31 Ill., 187.)

III. A conveyance of a homestead without a removal therefrom by the owner and family, does not constitute an abandonment of the homestead; and respondent having taken a conveyance back from Suess, did not lose his homestead as against the appellants, by his deed to Suess. (1 Wagn. Stat., p. 699, § 8; Tumlinson vs. Swinney, 22 Ark., 400; Morgan vs. Stearns, 41 Vt., 398; Locke vs. Rowell, 47 N. H., 46; 1 Am. Law Reg. [N. S.], 706-711-712; Fishback vs. Lane, 36 Ill., 437; Ives vs. Mills, 37 Ill., 73; Moore vs. Dunning 29 Ill., 130; Lamb vs. Shays, 14 Iowa, 570; Dearing vs. Thomas, 25 Ga., 224; Cox vs. Wilder, 2 Dill. C. C. 45; Rix vs. Capitol Bank, *Ib.*, 367; Bartholomew vs. West, *Ib.*, 290, in which Judge Dillon construes our Missouri Statute.)

IV. A sale by Montgomery would draw a hurtful cloud over respondent's title, and the court below therefore had jurisdiction to restrain such sale, or to give such other relief as the case might require. (Hill. Inj., 550; Kerr's Inj. in Eq., 597; 1 Sto. Eq. Jur., [10 Ed.,] §§ 698–700; Scott vs. Onderdonk, 4 Kern., 9; Petit vs. Shephard, 5 Paige Ch., 492; Gamble vs. St. Louis, 12 Mo., 617; Lockwood vs. St. Louis, 24 Mo., 20; Fowler vs. St. Joseph, 37 Mo., 240; McCormick vs. Fitzmorris, 39 Mo., 24; Wright vs. Christy, *Ib.*, 125; Winn vs. Cory, 43 Mo., 301; Leslie vs. St. Louis, 47 Mo., 479; McPike vs. Pen, 51 Mo., 63; Merchants' Bank vs. Evans, *Ib.*, 345; Clark vs. Cov. Mut. Life Ins. Co., 52 Mo., 272.)

V. A court of equity will moreover protect a homestead. The homestead right is one resting wholly in *parol* and is a fact *in pais* and cannot be created or manifested under our statute by any record evidence or notice; and while a judicial sale of a homestead is clearly void, it is believed that this is the more appropriate form of action in which to raise and decide such invalidity than in an action at law, such as ejectment and the like. See Conklin vs. Foster, 57 Ill., 104, in which it is held that a sale of the homestead draws a cloud over the title.

NAPTON, Judge, delivered the opinion of the court.

This was an application for an injunction to restrain Montgomery, a trustee in a deed of trust from Nussberger, for the benefit of Shields, from selling the lot conveyed in the deed, on the ground that such sale would cast a cloud on the title of plaintiff.

The facts appear to be as follows: Vogler, acquired the lot and house in the year 1865. Nussberger, obtained a judgment against Vogler about the 4th of Feb., 1868. A few days previous to this Vogler conveyed the premises to one Suess, and on Jan. 23, 1869, Suess conveyed back the same to Vogler. On Nussberger's judgment an execution issued; the lot was sold under it, and Nussberger became the purchaser, and a deed from the sheriff to him was executed, bearing date August 6th, 1868, and recorded Nov. 6th, 1868.

There was a mistake in the description of the boundaries of the lot in this deed, as there was in the deed by which it was acquired by Vogler, and a second execution was obtained and levied on the lot, and a sale made under it to Nussberger, who received a second deed from the sheriff, dated 20th of August, 1869, with a correct description of the boundaries of the lot.

At or previous to this second sale the sheriff was notified that Vogler claimed this lot as his homestead. No claim had been asserted in the first sale under execution. Vogler was married and had four children, and he and his family lived on the premises.

The judgment under which these sales were made was reversed on the 24th of Dec.,1869. The deed from Nussberger to Montgomery, for the benefit of Shields, was made on 16th of Dec., 1869.

The petition in this case sets forth these facts and asks an injunction to prevent Montgomery from selling under his deed of trust.

The principal grounds on which an injunction is asked are: First, that the reversal of the judgment destroyed the title of Nussberger under the execution sales, and, secondly, that Vogler's claim of the property as a homestead rendered the sale, and purchase of Nussberger a nullity; and these are the only questions of importance, whether it be held that it was a case for injunction or not.

There is no question that a reversal of a judgment does not invalidate sales under executions to strangers who purchase at the sale, but as to parties to the judgment the law seems to be settled otherwise; and if they become purchasers they take a title subject to the ultimate disposition of the case. In this case the plaintiff in the judgment buys and of course his title is affected by the infirmity, but he conveys to a third person before the judgment is reversed and the question is whether this infirmity attaches to the purchaser. In Gott vs. Powell, (41 Mo., 420,) the court excepted the case where some third person has acquired a "collateral right before reversal." The purchaser in such cases must be regarded as a purchaser without notice, since he buys from a party who derives title from a judgment and execution valid at the time, and really occupies the same position as if he had himself bought at the sheriff's sale. Whilst therefore the title of the plaintiff in the execution would be annulled by the reversal of the judgment, the sale or conveyance by the plaintiff to a third person before the reversal of the judgment would be valid, and the purchaser, supposing the purchase to be in good faith, would be protected from the risks which his vendor would be subject to. In this case the deed to Montgomery was made four days before the reversal of the judgment under which Nussberger

bought, and so far as this point is concerned he must be regarded as having acquired a good title.

But it is further objected that the sheriff's sale was void because of the property being claimed as a homestead and therefore protected from execution by our statute on that subject.

The construction of our homestead laws, (1 Wagn. Stat., p. 697,) has never so far as I have observed been before this court; so that we are left to resort to the general practice of all courts in construing obscure or doubtful provisions of a statute to carry out as nearly as possible what is believed to be its main scope and design, and in this we may be guided to some extent by adjudications in other States where similar laws have long existed. It seems to be well settled in the various courts in States where the homestead law has been discussed, that such laws, being prompted by benevolent intentions, are to be liberally construed and in such way as to promote the design of securing to a family a home protected from the creditors of the person who is its head.

It is easy to foresee or imagine cases in which the ministerial officers who are to be governed by it would be greatly embarrassed in regard to their duty in executing some of its provisions, but I do not propose to anticipate difficulties which may not occur or which future legislation may remove.

The points which arise on the present record have been mostly passed on by courts of the last resort in the States having similar statutes to ours.

Our statute limits the homestead in Sedalia, where this case originated, to thirty square rods of ground in extent and in value not to exceed fifteen hundred dollars. The second section of the act allows the housekeeper or head of the family in cases where the limitation is exceeded either as to quantity or value, to designate or choose such part as will not exceed the limitation, and provides that where there is such designation or choice, or where there is none made, in either event the sheriff shall appoint three appraisers to fix the boundaries and location of the homestead, and that the sheriff shall *then* proceed with the levy of the execution on the residue of the

real estate. We infer from this section that in a case where a homestead is claimed, the sheriff cannot proceed with the levy until he has thus appointed appraisers; nor does it seem to be material whether the housekeeper or the head of the family asserts his claim or not. It may be that he is absent. This law is for the benefit of the family, the wife and children as well as the head of the family. The occupancy of the house as a family residence is a fact easily ascertained by the officer. He cannot proceed with his levy until he has ascertained, in the mode directed by the act, the extent and the value of the premises, and that they are beyond the limit protected against executions.

The question of the title, we suppose, was not to be investigated by the sheriff. If the householder had no title, the execution and levy were of course unavailing, and the law was designed to protect his possession. If however there was merely an incumbrance on the property, the third section of the act directs how that is to be considered.

In this case it appears that Vogler, had, prior to the levy, conveyed his title to the premises to one Suess, and upon this ground it is claimed that he forfeited all the protection which the homestead law gives. If this conveyance was in good faith, and valid, then it is obvious that an execution and a sale under it would convey nothing; but if it was fraudulent, as it doubtless was claimed to be by the execution creditor, then the title was in Vogler, and the homestead law exempted it from execution. It appears to be the received opinion that neither a fraudulent conveyance nor an act of bankruptcy on the part of the head of the family will produce a forfeiture of the benefits of the homestead exemption. (Cox vs. Wilder, 2 Dillon, C. C. 46.) Judge Dillon thinks these laws are chiefly for the benefit of the family, and therefore will not allow the fraudulent acts of the head of the family to subvert the policy of the law, and this opinion was upon our Missouri Statute.

As Nussberger then, derived no title from either execution, levy or sale, he could convey none to Montgomery, and the proposed sale by Montgomery, would convey no title.

And this is urged as a reason why no injunction should be allowed.

But it is the true policy of courts to prevent litigation, and a sale by the trustee would undoubtedly cast a cloud over plaintiff's title, and embarrass a sale, if he desired to sell.

The judgment is affirmed with the concurrence of the other judges.

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J. C. GATES, *et al.*, Appellants, *vs.* R. E. WATSON, *et al.*, Respondents.

1. *Credit—Partnership, not bound—Partnership—Sale to member on personal credit—Partnership not bound.*—Where one elects to sell goods to a member of a firm on his individual credit, giving no credit to the firm, the co-partners will not be bound even if the goods purchased go into the partnership fund.
2. *Practice, civil—Pleadings—Partnership—When need not be pleaded.*—In an action for goods sold, plaintiff may show without alleging the fact in his pleading that defendant and another were partners and that the contract was made by such other partner for the benefit of the firm in the usual course of business. (Under our statute such contract is both joint and several, and it is not necessary to a recovery, that plaintiff should join all the partners as defendants.)
3. *Partners—Persons not, held as, when.*—In order to bind persons as partners it is unnecessary to show the partnership. It is sufficient to prove that they held themselves out as partners.

*Appeal from Jackson Circuit Court.*

*Karnes & Ess*, for Appellants.

I. The evidence in this case has just as much tendency to prove a partnership as in the case of Rippey vs. Evans, 22 Mo., 157.

II. It was not necessary to allege a partnership in plaintiffs' petition. (See vs. Cox, 16 Mo., 167; Lessing vs. Sulzbacher-35 Mo., 445; Smith vs. Cook, 31 Md., 174-5; Barry vs. Taylor, 1 Pet. 316–7; [Opinion of Chief Justice Marshall] Collyer Partn., § 715; Pars. Partn., 178.)

*J. Brumback and Gage & Ladd*, for Respondents.

I. The court committed no error in refusing to permit the witness Kendall to answer the question, "state whether you sold these goods on the faith of Watson's representations to your firm, that he and Huskins were going in with Hanway." The representation was that defendants were going in with Hanway; not that they were in, or were partners; the representation at most, was nothing more than that of a prospective partnership. The goods were sold to Hanway, charged to Hanway, Hanway's note taken for them; a settlement of the claim attempted to be made by these plaintiffs in conjunction with other creditors by acceptance of a deed from Hanway to be followed by a release from the debt, and finally, the note was proved as a claim against the estate of Hanway in bankruptcy.

II. The proof did not make out the case stated in the petition. The petition counted on a sale of goods to the defendants, Watson and Huskins alone. The proof offered was of a sale to an alleged partnership composed of Watson, Huskins, and Hanway and not of the case stated nor any part of it. The case pleaded was a transaction to which Hanway was not a party. The case proved, was at best, a transaction to which Hanway was ostensibly, and on the face of it, the only party on one side.

In a case of this nature, when the fact of a partnership must be proved to warrant a recovery, that fact is essential and must be pleaded. The fact is not mere evidence, that should not be pleaded, but the substantive ground of recovery to be established by the evidence. To tolerate the omission of such an essential fact from the petition, would put it in the power of a plaintiff to set traps for a defendant, and lead to great abuses. (Jones vs. Fuller, 38 Mo., 363; Forrester vs. Kirkpatrick, 2 Min., 210; Irvine vs. Myers, 4 Minn., 229.)

III. Having with full knowledge of all the facts, dealt with and trusted and given credit to Hanway alone, they could not as a matter of law on the facts proved recover against defendants below. The Circuit Court rightly ruled that no case was made out by the evidence. (Farmers' Bank vs. Bayless, *et al.* 35 Mo., 428, and authorities cited therein.)

VORIES, Judge, delivered the opinion of the court.

This is an action to recover the price of goods alleged to have been sold and delivered by the plaintiffs to defendants. The petition states that the plaintiffs were partners, and as such sold and delivered goods to defendants; and is in the usual form. The answer of the defendants fails to deny that the plaintiffs were partners, but denies all other allegations in the petition, a trial was had before a jury. On the trial the evidence tended to prove that plaintiffs were partners engaged in selling boots and shoes in Kansas City, Mo.; that in the fall of the year 1868, defendants were engaged as partners in the dry goods business at Wyandotte, in Kansas; that at said time one S. B. Hanway came to the store of plaintiffs and wanted to purchase goods of the plaintiff on credit; that the plaintiffs refused to sell Hanway goods on credit; that Hanway applied to plaintiffs at different times to purchase goods on credit, but that plaintiffs positively refused to sell. The plaintiff then offered to prove a partnership between the defendants and S. B. Hanway. This evidence was objected to by the defendants on the ground that no such partnership was charged in the petition. The court admitted the evidence of partnership, subject to be passed on and determined by instructions to be given by the court at the conclusion of the plaintiffs' evidence. It was then shown by the evidence that the goods sued for were sold by plaintiffs at the time and for the price named in the petition; that the charge made in the books for the goods was made against Hanway; that after plaintiffs refused to sell goods to Hanway, defendant Watson came to plaintiffs' store and said to plaintiffs that he and Huskins were going in with Hanway and were going to take the goods down to the Indian country to trade for cattle and stock, and that it would be all right. Watson said they were going to take the goods by teams to the Indian country; that Hanway was an old experienced cattle trader; that Huskins was going along with him to do the financeering; that the cattle were to be sent up to Kansas City and that he, Watson, was to have the management at that end of the line, and sell the cattle.

The witness was then asked whether he had sold the goods on the faith of Watson's representations, that he and Huskins were going in with Hanway. This question was objected to and excluded on the ground that it was immaterial and irrelevant, and the plaintiffs excepted. The witness then stated that the goods were delivered to Hanway loaded in wagons and hauled off; that he never personally demanded payment for the goods of Watson and Huskins, or presented them the account. It was further proved, that at the time these goods were sold, Hanway was indebted to plaintiffs on an old account; that defendant Watson, afterwards paid them five hundred dollars on Hanway's old account; that after the talk with Watson the goods were sold and delivered to Hanway, and that plaintiffs took Hanway's note for the price of the goods and afterwards proved up said note against Hanway's estate in bankruptcy, and that Hanway was at that time in the State of Texas; that Watson has been residing in Kansas City since the sale of these goods, that no account has been made out against defendant for these goods until the account was made out for the purpose of bringing this suit; that Hanway had conveyed a tract of land in Kansas to plaintiff Gates, for the benefit of plaintiffs and other creditors.

One E. A. Phillip testified that in the fall of 1868, he was a member of the firm of Plant & Co. in Kansas City, that he knew defendants and J. B. Hanway; that in November 1868, Hanway came to witness' firm and wanted to purchase goods of them on credit; that they refused to sell him the goods; that defendant Watson then came to witness and stated, "we are going in with Mr. Hanway." He gave no name as to who were meant by "we;" that witness traded in wagons; that defendants and Hanway took a stock of goods south to the Indian country; that Watson wanted witness to let Hanway have a certain number of wagons, by paying only part for them at the time, less than witness was willing to take. Watson said we are going in with Hanway and would see that he got his pay. He made a statement of what they proposed to do. He said they would take a stock of goods to the Indian country

and that Hanway was to trade them for cattle. Watson and Huskins were to have the disposal of the cattle and handling the proceeds. Witness than sold and delivered the wagon to Hanway, and Watson and Huskins afterwards paid witness one thousand dollars on an old debt of Hanway. Watson also said that Huskins was going down with him, Hanway, to dispose of the goods. Another witness testified that Watson about the same time told him that they were going to close out in Wyandotte and take the goods to the Indian country, and that they wanted more goods to fill up the stock; that he sold them goods and charged them to Watson and Huskins; that Watson afterwards came to witness to get him to change the charge as to part of the goods and charge them to Hanway, which was done. Watson said he had a special reason for wanting the change on the charge, saying it would be all the same; Watson selected the goods, Hanway not being present.

This was substantially the evidence in the case. At the close of the plaintiffs' evidence the court instructed the jury as follows: "The jury are instructed that on the pleadings and evidence in this case the plaintiffs cannot recover." After the giving of this instruction the plaintiffs suffered a non-suit with leave to move to set the same aside,which motion having been made and overruled by the court, the plaintiffs appealed to this court.

During the examination of one of the plaintiffs as a witness on the trial of the cause, he was asked whether he had sold the goods on the faith of Watson's representations that he and Huskins were going in with Hanway. This question was excluded by the court, and the exclusion of this evidence is assigned as error in this court. This evidence would tend to prove that the credit was not given exclusively to Hanway on his individual account, and might be material, if the other evidence in the case should be held to be sufficient to prove a partnership, between Hanway and the defendants, and that the goods were purchased for the use of the partnership. Yet in a case like this where some of the evidence tended to show that

the credit was given to Hanway and not to the partnership the evidence excluded might be very material; for notwithstanding the existence of the partnership which was known to plaintiffs if they had elected to sell the goods to Hanway upon his individual credit giving no credit to defendants, the defendants would not be bound, even if the goods purchased had gone into the partnership fund. (Farmers' Bank vs. Bayless, *et al.*, 35 Mo., 428.) The evidence would therefore be material to contradict the idea that the credit was exclusively given to Hanway. The instruction given by the court assumes that no legal evidence had been introduced in the case tending to prove the plaintiffs' cause of action. Whether this instruction is right or wrong will depend somewhat on the further question, which is presented by the record, viz: whether evidence tending to prove that a partnership existed between Hanway and defendants in reference to the goods purchased, could be legally admitted in the case, no partnership having been alleged in the petition? The petition simply charges that the goods were sold and delivered to the defendants. This allegation the plaintiff attempted to prove by showing that the defendants and Hanway were partners, and that the goods were sold to Hanway for the benefit of the firm. This it is insisted by the defendants cannot be done. They insist that the existence of the partnership is a substantive and material fact, and that in order to a recovery against the defendants, the partnership must be averred, and the defendants sued as partners, or no evidence is admissible to prove the partnership. At common law, when part only of the members of a partnership were sued on a partnership contract, the partner sued might plead the non-joinder of the other partners in abatement. But our statute makes all such contracts joint and several, and a person having a demand against a partnership, under our statute may sue any partner or all of the partners at his election. In such case he may aver that the contract sued on is the contract of the defendants; and to prove this averment he may show that the contract was made by the parties sued through an agent authorized to make it

for the defendants, or, what is the same thing, he may show that the defendants and another were partners, and that the contract was made by such partner for the benefit of the firm, in the usual course of their business. A party is not bound, in his pleading, to set forth the evidence by which he proposes to make out his case. (See vs. Cox, 16 Mo., 166; Lessing vs. Sulzbacher, 35 Mo., 445.) Jones vs. Fuller, 38 Mo., 363, referred to by the defendants, when properly understood does not conflict with this view of the law.

The only remaining question to be considered is, does the evidence in the case tend to prove a partnership between Hanway and defendants in the goods purchased? It seems to me that the evidence strongly tends to prove the partnership. It is true that the particular terms of the partnership are not shown; nor does the evidence tend to show them, nor is it necessary that it should do so. It is sufficient if the evidence tends to prove that the defendants, held themselves, out to plaintiffs and others, as partners in the particular transaction. The evidence in this case is very similar, to the evidence in the case of Rippey vs. Evans, 22 Mo., 157, where it was not only held to be evidence of a partnership, but that it was sufficient after verdict. In this case the evidence not only tends to prove a partnership on the one hand, but portions of the evidence tend to prove, that the credit was given to Hanway only. Both of these questions should have been submitted to the jury under proper instructions.

The judgment will be reversed, and the case remanded. The other judges concur.

GEO. T. WHITE, Administrator of G. B. HENLY, deceased, Defendant in Error, *vs.* JNO. HENLY, SR., Plaintiff in Error.

1. *Administrator—Suit by—Defendant cannot as surety set off what notes—Construction of statute.*—In suit by an administrator, defendant, under the statute (Wagn. Stat., 1274, § 3) cannot set off notes of the intestate, upon which defendant was surety, where the notes remained due and unpaid at the decease, although they were duly probated and after probate paid by defendant, and, although the estate of deceased was insolvent. Defendant did not come within the purview of the statute, for he did not own the notes, and was not a creditor at the time of the intestate's death.
2. *Practice, civil—Special verdict—Judgment upon.*—On the finding of issues in the nature of a special verdict, the court has the undoubted right to render judgment.

*Error to Cole Circuit Court.*

*Edwards & Son, and Lay & Belch*, for Plaintiff in Error.

I. The notes given by Green Henly, with the defendant as his surety for money borrowed by Green Henly, and due in the life-time of Green Henly, which were paid by defendant before suit brought against him in this case, Green Henly being insolvent at the time of the execution of the notes and at the time of his death, were proper counter-claims in this action, and the court erred in striking them out. (Morrow vs. Bright, 20 Mo., 300; 1 T. R., 662; Reppy vs. Reppy, 46 Mo., 572.)

II. The interest of a trustee of an insolvent, is exactly that of an insolvent himself, as it is effected by countervailing equities at the time of the assignment. Administrators occupy the same relation to their intestates and their estates, as trustees and their insolvents. (Krause vs. Beitel, 3 Rawle, 199 Nickerson vs. Gilliam, 29 Mo., 456.)

III. When an insolvent plaintiff is suing, equity will take jurisdiction of unliquidated claims and allow off-sets, which would not be allowed at law; but the demand must exist against the plaintiff in favor of the defendant at the time of the commencement of the suit. (Wat. Set Off, p. 80; Bradley vs. Angell, 3 Comst., 475; 2 Bart., 253.)

*Ewing & Smith*, for Defendant in Error.

I. Because defendant's attorneys choose to term their demands counter-claims, the statute is not thereby changed. The demands do not come within the definition of counter-claims. They are, after all, nothing but set-offs. And the second section of the statute (R. C., 1855, p. 1462,) provides that a debt to be the subject of a set-off, must be due at the time of the death of the deceased, and from the deceased to defendant.

II. Neither could defendant claim to be subrogated to the rights of the payees of the notes, by paying them off so as to use their demands as set-offs or counter-claims. The only subrogation permissible in such a case, would be to have any collaterals or liens that the payee may have had, transferred to them upon their paying the debt. (Miller vs. Woodward, 8 Mo., 173; Furnold vs. Bank of Missouri, 44 R., 339; Hays vs. Wand, 4 John. Ch. R., 129.)

III. To promote and encourage trade and commerce, legislators and courts have enacted and sanctioned rules by which, one man holding another's note, may, in the course of trade, transfer it to a third party, investing him with the same right to receive the amount that he had; but the debt is extinguished if a mere volunteer steps in and pays off the debt, or one of the payees pays it off. In both these instances, the debt is extinguished. (1st Sto. Eq., § 444; Colman vs. Whoelock, 42 Barb., 207; 34 N. Y. [7 Tiff.], 440; Benton vs. Rutherford, 49 Mo., 258; Blake vs. Downey, 51 Mo., 437, 438.)

IV. The procedure amounts to nothing else than purchasing demands on plaintiff's intestate after his death for the purpose of using them as off-sets, which is clearly not permissible. (Root vs. Taylor, 2 Johns. Ch., 137; Whitehead vs. Cade, 1 Howe [Miss.], R., 95; Wat. Set Off, p. 381.)

The court had the right to render judgment on the findings of the jury. (Spalding vs. Mayhall, 27 Mo., 377, 380.)

WAGNER, Judge, delivered the opinion of the court.

Some confusion is apparent in this record, from the anomalous character of the proceedings upon the trial. In some respects, the case was treated as a suit in equity, and in other regards, as an action at law. It is manifest, that it had very little of the elements of an equitable suit, as it demanded simply a judgment in money, and no case was shown, either in the pleadings or evidence, which would warrant a decree by a chancellor. The petition avers, that the plaintiff's intestate, who was the son of the defendant, bought, in 1853, of one Ring, for the sum of six hundred dollars, an eighty acre tract of land, and took possession of the same, and, in consideration that defendant agreed to loan the deceased said sum of money, and did loan the same for the payment of the purchase money, it was agreed, at the time of the purchase, that Ring should convey the land directly to the defendant, and that defendant should hold the land as a security for the repayment of the money and in trust for the intestate; and that defendant would convey the same to the deceased, whenever he had repaid to defendant the money so furnished; that, in pursuance of said agreement, the intestate, after taking possession of the land, at various times from and after that time, made various payments to defendant up to the month of October, 1857, when a balance was found due to defendant of the sum of two hundred and fifty dollars, for which said intestate executed his promissory note, and departed this life without paying the same; that, whilst the said intestate occupied the land, he claimed it as his own, and, with the knowledge and consent of defendant, proceeded to make valuable and lasting improvements on the same to the amount of at least fifteen hundred dollars, whereby the selling price of the land was greatly enhanced, and by means of which the defendant was enabled to sell, and, in the year 1863, did, for the sum of two thousand dollars, wrongfully, and in violation of the rights of the creditors of the deceased (his estate being insolvent), sell and convey said land to an innocent purchaser, who received a conveyance and paid over to defendant said sum of money, without having any knowledge or notice of the equities of the

representatives of the intestate, in and to the same; and that defendant, in fraud of the rights of the creditors of the intestate, wrongfully neglected and refused to pay over the proceeds of said sale, after he had reimbursed himself for the amount that he had so loaned. There was then a prayer for judgment for the amount defendant had received on account of the sale, less whatever sum remained unpaid by the decedent of the original purchase money.

To this petition the defendant filed a demurrer, which, on motion of plaintiff, was overruled. He then answered. The answer contains a denial of all the material allegations in the petition, and in addition thereto sets up certain notes as off-sets, upon which defendant was surety for the deceased, and which he had paid off after his death; and also insisted upon the statute of frauds as a bar to the action. All that part of the answer relating to the off-sets was by the court stricken out as constituting no defense.

A jury was impaneled and certain issues were framed and submitted to them, embracing all the allegations of facts contained in the petition. After hearing the evidence, the jury found all the issues in favor of the plaintiff and a judgment was entered upon their finding.

First, we will consider the action of the court in striking out a part of the defendant's answer. The first off-set claimed, was the note executed by the deceased to the defendant, and which was stated in the petition to be due. The ruling of the court, therefore, in this matter, could not redound to the detriment of the defendant, as the plaintiff admitted it in his own pleading and voluntarily gave the defendant credit for it. All the other notes were obligations, executed by plaintiff's intestate as principal, with defendant as surety, and which remained due and unpaid at intestate's death. They were duly probated against the estate, and paid off by the defendant after they were probated.

The statute, in force at the time this proceeding arose (and the same provision exists now), says, "In suits, brought by administrators and executors, debts existing against their in-

testate or testator, and belonging to the defendant at the time of their death may be set-off by the defendant, in the same manner as if the action had been brought by and in the name of the deceased." (2 R. C., 1855, p. 1462, § 2; 2 Wagn. Stat., p. 1274, § 3.)

As the defendant did not own the notes, and was not a creditor at the time of the intestate's death, the notes could not be pleaded or allowed as set-offs in this suit. The case of Morrow vs. Bright, (20 Mo., 298) does not militate against this view. In that case, Morrow's general assignee for the benefit of creditors brought an action against Bright, for about eight hundred dollars, due upon a note, account stated and agreement, all of which were included in the assignment. Bright pleaded as a set-off, five hundred dollars paid by him after the assignment, on a protested note of Morrow's on which he was indorsee. The note was protested before the assignment, but not paid till afterwards.

In the opinion, the court says: "Money cannot be said to be laid out for another, until money is actually paid on his account; but, in substantial justice, as Bright was Morrow's surety, and compelled by law to pay the debt, and as Morrow was insolvent, Bright may be regarded as the creditor of Morrow from the time the note was protested. Then, as there was an indebtedness on the part of Morrow, to Bright, and as the very act of assignment was evidence of insolvency, by which Bright became absolutely bound, there was an equity against the demand of Morrow at the time of the assignment. It will be perceived that the court treated the protest of the note as determining the indorser's liability, and this occurred prior to the assignment. The case goes to the utmost limit of allowing an equitable set-off, but it does not go sufficiently far so as to sanction the claim in this case. The creditors here, in the first place, proved up their demands against the estate of the deceased, and it was not till long after his death that the defendant paid them off. To allow them, therefore, to be introduced as off-sets, would be in direct opposition to the statute.

We have examined the evidence carefully, and are fully

satisfied that it sustains the verdict of the jury. We do not regard this case as one in equity, but were we reviewing the facts as a chancellor, we would be forced to come to the same conclusion that the jury arrived at. The facts testified to by the witnesses at the purchase of the land, the various admissions by the defendant, assessing the land in the name of the deceased, and his paying the taxes on it during the whole period of his occupancy, and, after his death, the same acts being performed by the administrator—all form connecting links, which irresistibly tend to make out the plaintiff's case. The finding of the issues were in the nature of a special verdict, and the court had the undoubted right to render a judgment upon it. (Spalding vs. Mayhall, 27 Mo., 377.)

It is insisted upon as error here, that the court gave verbal instructions to the jury, but the record does not show that instructions were given at all.

The statute of frauds certainly has no application to the case. There was no question raised in any manner affecting any interest in, or title to real estate. We have been unable to discover any such error in the ruling of the court in reference to the admission or rejection of evidence, as to affect the substantial merits of the case, and we are of the opinion that the judgment should be affirmed.

Judgment affirmed. All concur.

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MALINDA J. JONES, *et al.*, Appellants, *vs.* R. A. SNODGRASS, Respondent.

1. *Attachment—Plea in abatement—Appeal will not lie from.*—Under the present statute, (Wagn. Stat., 189-90, § 42,) an appeal will not lie from a judgment on a plea in abatement. [Davis vs. Perry, 46 Mo., 449.]

*Appeal from Moniteau Circuit Court.*

*Edmund Burke*, for Appellants.

*Owens & Woods*, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

The plaintiffs instituted a suit by attachment under the Landlord and Tenant Act, and the defendant filed in the cause a plea in the nature of a plea in abatement. The issues being made up and tried on this plea they were found for the defendant and judgment was rendered thereon. From this judgment the plaintiffs appealed.

Under our present statute, a judgment on a plea in abatement for the defendants, does not abate the suit, but it still continues as in an ordinary action, (1 Wagn. Stat., p. 189, § 42,) and proceedings by attachment under the Landlord and Tenant Act, are conducted in the same manner as provided by law, in cases of suits by attachment, (2 Wagn. Stat., p. 882, § 27,) as the cause still subsists in court and is not finally determined. It is plain, therefore, that an appeal will not lie from the judgment upon a plea in abatement. (Davis vs. Perry, 46 Mo., 449.)

The result is, that the appeal must be dismissed. The other judges concur.

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M. S. HULL, Respondent, *vs.* CITY OF KANSAS, Appellant.

1. *Damages—Injuries by reason of bad streets combining with other causes.*—If the driver of a horse is in the exercise of ordinary care and prudence, and injuries done the animal are attributable to the insufficiency of the street conspiring with some accidental cause the municipality is liable in damages.

*Appeal from Jackson Circuit Court.*

*Brumbach*, for Appellant.

I. It cannot be contended that the city is bound to keep all its streets in such condition that horses harnessed to buggies becoming unmanageable from viciousness, fright, disease, or any kind of accident, against which, owners or drivers cannot guard, may move in safety over every street from side to side, and end to end. If instead of the hole there had been

at the same spot, a gas lamp-post or a telegraph pole, damage would have ensued. Would the city then have been liable?

It is no answer to the argument to say, that the hole was a dangerous place or dangerous to those using the street in the ordinary or usual way, and therefore the city must be charged. That is simply begging the question. There was here no use of the street in the ordinary usual way at the time of the injury. The most that can be said is, that the city owed to the public the duty to keep its streets in a safe condition for use in the usual mode by travelers. (Dill. Mun. Corp., 754, Chap. 23 [1st. Ed.], § 789 and cases; Titus vs. Inhabitants of Northbridge, 97 Mass., 258, and note; Fogg vs. Nahant, 98 Mass., 578; Babson vs. Rockford, 101 Mass., 93.)

IV. Hull was violating the Sunday law in carrying on his business, and would not have been injured if he had not been in violation of law. (1 Wagn. Stat., 504; Shearm. & Redf., Neg. [1st Ed.], § 39, and cases cited, Ch. 3, p. 40; Jones vs. Andover, 10 Allen, 18.)

*Tichenor & Warner*, for Respondent.

I. The charter of defendant as to control over its streets is the same as that of St. Louis under which said city was held liable in a like case. (Blake vs. The city of St. Louis, 40 Mo., 570; Sess. Acts 1870, p. 333, § 7.)

II. Neither the charter of defendant, nor the statutes (§§ 32-34; 1 Wagn. Stat., 504), nor Blake vs. The city of St. Louis relieve the defendant from the duty of keeping its streets safe from travel on Sunday.

III. The cases relied on by the defendant to-wit: Titus vs. The Inhabitants of Northbridge, 97 Mass., 265, and 98 Mass., 578, expressly except cases like this, and the court expressly asserts that if the horse is only momentarily uncontrolled by his driver it is no defense. In the case at bar the horse only backed the length of buggy, and was not vicious or frightened before he fell in. (Babson vs. Inhabitants of Rockport, 101 Mass., 93.)

IV. The true rule is laid down in Winship vs. Enfield 42 N. H., 197; see pp. 214–215, and authorities cited.

NAPTON, Judge, delivered the opinion of the court.

This action was to recover damages for an injury to a horse and buggy, alleged to have been occasioned by a hole in a street, negligently left uncovered by the city authorities.

The facts appeared to be, that the driver of the buggy when attempting to turn from one street into another, got one of the lines entangled under the horse's tail, which caused the horse to commence backing, and as the driver was about to jump out, the horse fell into this hole in the embankment on which the street was built.

The court, on the trial, declared the law to be "that it was the duty of the defendant to keep its streets in a proper state of repair, so that they should be reasonably safe for travel, and if the defendant permitted one of its streets to be and remain out of repair, and at the time said street was so out of repair, the plaintiff's horse and buggy were being driven along the same, and without the fault of the driver, the horse and buggy of plaintiff were injured by reason of said street being out of repair, then the plaintiff is entitled to recover, even though such injury was the combined result of accident and of the defendant's neglect to keep said street in repair; provided the driver of said horse was in no fault."

The court refused to declare the law as asked by defendant, that if the defect in the street was not the sole cause of the injury, no recovery could be had; and therefore if before the accident, the driver of the horse had lost all control over him, and the horse continued uncontrollable at the time of the accident, the plaintiff could not recover.

Another instruction was asked; that if this occurred on Sunday, and the plaintiff who was the owner of the horse and buggy had hired them out on that day from his livery stable, no recovery could be had.

There was a verdict and judgment for plaintiff. The point presented by the instructions in this case, I understand, was decided at the last term at St. Joseph, in the case of Bassett vs. The City of St. Joseph, 53 Mo., 290, in which

case, this court adopted the view taken by the New Hampshire court in Winship vs. Enfield, 42 N. H., 202, and declined to follow the decisions in Massachusetts, referred to in the brief of defendant's counsel.

The Circuit Court of Jackson County evidently adopted the views of the New Hampshire cases, and determined, that although the injury was the result of accident, in the temporary loss of control over the horse; yet, if that accident would have resulted in no damage, had the street been in a proper repair, the city must be held responsible.

Indeed, it is not very clear that the Massachusetts cases go to the extent of holding that a mere temporary loss of control over the horse driven along the street would relieve the city from responsibility. It is held, that where the horse escapes from the driver entirely, or is totally ungovernable, or is a vicious animal, the damage occasioned is not chargeable to the city or town, because it ultimately occurs in a street or at a place where the street is out of repair.

In this case the driver had not lost control of the horse, except during the short period of his backing into the hole, and if no such hole had been there, no damage would have occurred. In the case of Hunt vs. Pownall (9 Verm., 411), Redfield, J. said: "In every case of damage occurring on a highway, we could suppose a state of circumstances in which the injury would not have occurred. If the team had not been too young, or restive, or too old, or too headstrong, or the harness had not been defective, or the carriage insufficient, no loss would have intervened. It is to guard against these constantly occurring accidents that towns are required to guard in building highways. The traveler is not bound to see to it that his carriage and harness are always perfect, and his team of the most manageable character and in the most perfect training, before he ventures upon the highway. If he could be always sure of all this, he would not require any further guaranty of his safety unless the roads were absolutely impassable. If the plaintiff is in the exercise of ordinary care and prudence and the injury is attributable to the insufficiency of the road,

conspiring with some accidental cause, the defendants are liable."

This is in substance the position of the Circuit Court in its instructions in the case.

Judgment affirmed. Judges Wagner and Sherwood absent.

[JANUARY TERM CONTINUED IN VOL. LV.]

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ACKNOWLEDGMENT; See Limitations, 4.

ADMINISTRATION.

1. *Administrator—Final settlement, continuance of—Notification, failure of—Effect of.*—In 1860 an administrator gave statutory notice of a final settlement at the next term of Probate Court. At that term he filed his settlement, but on his motion, the same was continued till the next term. No further notice was taken of the settlement till 1870, when the administrator, without further notification, withdrew his final settlement and made a different and corrected one. *Held,* that the latter settlement had no binding force on the parties interested in the estate.—Brashears vs Hicklin, 102.

2. *Administrators—Final settlement—When set aside.*—A final settlement, made by an administrator, has the force and effect of a judgment, and can only be set aside or overcome on the ground that it was fraudulently procured; mere illegal allowances, unless obtained by fraud, are no ground for impeaching or setting it aside.—Lewis v. Williams, Adm'r of Henry, 200.

3. *Administrators—Acts done before appointment—Innocent parties.*—Acts done by an administrator, prior to his appointment, will be validated by his subsequent appointment, except where the rights of innocent parties intervene.—Wilson v. Wilson, 213.

4. *Executors—Deed—Subsequent probate of will.*—A will giving power of sale vests the title in the executor at the time of the testator's death, and his deed of the property, made before probate of the will, is a good conveyance, provided the will be subsequently probated.—*Id.*

5. *Executors—Wills—Direction to support family of testator—Supplies furnished—Suit for.*—A. by his will directed his executors to support his family till his estate should be divided. B., a merchant, sold certain supplies to the widow, and sued the executors therefor. *Held,* that to allow such a suit would subvert the will of the testator, who confided in his executors to furnish the family with reasonable funds; that if they failed to do so, they could be compelled to perform this duty by a court of equity, perhaps by the Probate Court itself.—Reid vs. Porter, 265.

6. *Administration—Widow—Legatee—Suit by, in her own right in sister State.*—An estate was fully administered in Kentucky. Having no debts in Missouri, it was not probated here. The widow, who was executrix and also devisee of the estate, after final settlement, brought suit in her own right upon a claim owing the estate by a defendant residing in Missouri. *Held,* that the action would lie in this State. Morton v. Hatch, 408.

7. *Administrator's bond.—Failure to approve, etc.*—The failure of a County or Probate Court to approve an executor's bond does not render it invalid.—Burrough v. Farmer, 439.

8. *Administration—Witness "to contract or cause of action."*—In a suit by an administrator *de bonis non*, against the sureties of the former administrator or executor, to recover monies, charged to have come into the hands of the former administrator as such, and not accounted for by him, *Held,* 1st. That it is no defense to said action, for the sureties to show that certain demands had been allowed against the estate which were barred by the statute of limitations. The question whether such claims were properly allowed, is wholly immaterial and collateral to the issues to be tried, and are not proper subjects of inquiry in the cause.

ADMINISTRATION, continued.

2nd. That the testimony of the administrator of the former who executor is then dead, was competent to prove payments made by the deceased executor during his life-time, on claims or demands against the estate; and as to what was said by said executor at the time of said payments. The subject matter of such testimony was not the contract or cause of action then in issue, nor was the witness the other party to the action.—*Ibid.*

9. *Administrator—Demand allowed by collusion—Sale of lands—Bill in equity to postpone.*—Where a claim against an estate is allowed, and land belonging thereto is about to be sold to satisfy the allowance, through fraud and collusion between the administrator and the claimant, a bill in equity by the heirs to set aside the allowance and postpone the sale is a proper remedy, notwithstanding that an action of damages would lie against the administrator on his bond. Such action would sound only in damages and would fail to reach the land. Jurisdiction by a court of equity is not ousted, in such case, because a remedy exists at law.—State v. Caldwell, 536.

10. *Administrator—Suit by—Defendant cannot as surety set off what notes—Construction of statute.*—In suit by an administrator, defendant under the statute (Wagn. Stat., 1274, § 3) cannot set off notes of the intestate, upon which defendant was surety, where the notes remained due and unpaid at the decease, although they were duly probated and after probate paid by defendant, and, although the estate of deceased was insolvent. Defendant did not come within the purview of the statute, for he did not own the notes, and was not a creditor at the time of the intestate's death.—White v. Henley, 592.

See Practice, civil pleading, 8; Wills.

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1. *Agency—Liability of principal.*—Authority to purchase wheat necessarily implies and includes authority to give directions as to its delivery. Owen v. Brockschmidt, 285.

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ARBITRATION AND AWARD.

1. *Arbitration and award—How far conclusive.*—The award of arbitrators is conclusive as to all matters within the scope of the authority given them in the submission, but if they assume to act on questions not submitted, or fail to follow the directions in the submission in a material point, their award, in reference to such matters, will not be binding either on questions of law or fact.—Squires v. Anderson, 193.

2. *Arbitration, submission to—Construction of—Permanent improvements—Vines.*—A. and B. were partners in business, A. furnishing the land to be cultivated and the money necessary, B. furnishing his labor. By the terms of a submission to arbitration between them, in order to settle up the partnership, A. was to be charged for all permanent improvements made on his land by the firm. *Held*, that the increased value of vines, due to their growth during the existence of the partnership, which were growing on the farm before the partnership was formed, was not chargeable against him as permanent improvements made by the firm.—*Id.*

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1. *Attachment—Plea in abatement—Appeal will not lie from.*—Under the present statute, (Wagn. Stat. 189-90, § 42,) an appeal will not lie from a judgment on a plea in abatement. [Davis v. Perry, 46 Mo., 449.] Jones v. Snodgrass, 598.

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2. *Notes and Bills of Exchange—Criminal prosecution, dismissal of.—Indebtedness.* A note given to secure the dismissal of a criminal prosecution for embezzlement, whether the agreement be express or implied, is void, though it is made for the amount of money alleged to have been embezzled. Sumner v. Summers, 340.

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BONDS, JUDICIAL.

1. *Practice, civil—Trials—Bonds, loss of—Parol testimony.*—When a bond is given in a cause and is afterwards lost, its contents may be proved in that cause by parol testimony. Compton v. Arnold, 147.

2. *Attachment bond—Suit on—Seal.*—A seal or a scrawl by way of seal, is an essential requisite to an attachment bond filed in the circuit court. State of Missouri v. Early, 338.

3. *Practice, civil—Trials—Evidence—Bonds—Lack of seal, how objected to—Pleadings.*—When suit is brought on a bond executed by the defendant, the objection to its introduction in evidence, on the ground that there is no seal to it, will not be considered, unless its execution was denied in the answer upon oath. (Wagn. Stat. 1046, § 45.) *Id.*

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BONDS, RAILROAD.

1. *Bonds, railroad—Coupons—Suit on, in U. S. Courts—Jurisdiction—Aggregate amount.*—In suit to recover coupons on railroad bonds issued by a County Court, the question, whether the amount sued on is sufficient to bring it within jurisdiction of the Circuit Court, is to be determined by the aggregate amount of the coupons.—Smith v. Clark County, 58.

2. *Railroad bonds—Coupons—Negotiability of.*—Railroad coupons are not rendered non-negotiable by the fact that they are not made payable to a particular person.—*Id.*

3. *Bonds—Railroad—County—Subscription—Popular election—Subscription, right of, a franchise—Repeal of special by general law—Bonds, recitals in—Innocent holder—Estoppel, etc.*—Section 14 of the North Mo. R. R. Charter of 1851 authorized counties along the line of the road to subscribe thereto, without the sanction of a popular vote. Section 10 of the act of 1857, creating the Alexandria & Bloomfield Railroad Company, (Sess. Acts 1856-7, p. 94,) made said section 14 a part of the latter charter. *Held,*

1st. that the right of subscription, conferred by section 14, was not exclusively that of the counties, but was a privilege of the railroads, and might be transferred, by section 10 aforesaid, to the A. & B. R. R. Co.

2nd. That bonds issued in 1865 by the County Court of Clark county, in aid of the A. & B. R. R. Co., under the authority conferred by the charter of 1857 were valid notwithstanding the inhibition of the act of March 23rd, 1861 (Sess. Acts 1861, p. 60, § 1). The last named, being a general act, did not repeal the former and special one.

3rd. Although said bonds on their face recited, that they were issued under the general act for the formation of railroads, passed in 1855, and that act, as amended by the acts of 1860 and 1861, required a popular vote to authorize the issue of the bonds, such recitals would not estop an innocent holder from showing, that, in point of fact, the bonds were issued under the special act of 1857.—*Id.*

PER NAPTON, JUDGE.

4. *Bonds, county—Railroad—Bona fide holder—Popular vote—Recitals as to—Defenses.*—The act of 1855, and the amendments thereto, required a popular vote to authorize the issue of Clark county railroad bonds; and the bonds recited, that they were issued as authorized by the act. *Held,* that the holder would have a right to presume, that the acts had been complied with; and in suit on the bond, by a *bona fide* holder without actual notice of the facts, the defense, that no such popular vote had been taken, would be unavailing.—*Id.*

ON MOTION FOR REHEARING.—PER CURIAM.

*Held,* that the recitals of the bonds would not be conclusive upon the county as to the fact of the election.—*Id.*

5. *Bonds county—Railroad—Legal existence of Railroad—Issue as to, not to be raised collaterally—Quo Warranto, etc.*—In suit on a bond given by a County Court in aid of a subscription for a railroad, the question, whether the corporation had a legal existence, cannot be raised. The only proper way to test this question would be by *quo warranto* on the part of the State.—*Id.*

6. *Railroads—Subscriptions to—County bonds—Charter—Subsequent general statutes.*—A provision in the charter of a railroad company, authorizing county courts to subscribe stock to such railroad without a vote of the people, is not repealed by subsequent general laws, nor by the subsequent adoption of the present Constitution. [Smith v. Clark County, *ante*, p. 58.]—State, *ex rel.* v. Greene County, 540.

7. *Railroads—Counties and municipal bodies, subscription to—Privilege.*—The power conceded to counties or other municipal bodies by a railroad charter, to take and subscribe stock in such railroad, was intended as a privilege to the railroad.—*Id.*

8. *Railroads—Consolidation—Effect of.*—When several railroads consolidate, the new road shall stand in their place, and possess the rights, power and privileges they had severally enjoyed in the portions of the road which had previously belonged to them.—*Id.*

9. *Railroads—Bonds, county—Kansas City & Cameron R. R.—Consolidation—Branch road—Act of March 21, 1868.*—The action of the directors of the Kansas City & Cameron R. R., formerly the Kansas City, Galveston & Lake Superior R. R., in determining to build a branch R. R., in accordance with the act of March 21, 1868, and the charter of the Kansas City, Galveston & Lake Superior R. R., and the acts amendatory thereto, followed by the partial building thereof, and followed by their own consolidation with the Han. & St. Joseph R. R., did not deprive such branch road of the privilege of subscriptions from county courts of the counties along the line of the road without a prior vote of the people therein, such privileges being contained in the original charter of the Kansas City, Galveston & Lake Superior R. R.; such branch road was authorized by and was built in conformity to the provisions of the original charter, and, under the act of March 21, 1868, though nominally a branch, was in reality a distinct and separate road from the Hannibal & St. Joseph R.—R.—*Id.*

10. *Railroads, subscription to—Counties—Consolidation—Different enterprise.*—A power given to a county to subscribe to a specific R. R. enterprise will not authorize the county to subscribe to the stock of a wholly different company with a different enterprise in view, although the former company may have become consolidated with the latter, or transferred its corporate rights to it, unless such consolidation or transfer was contemplated by the original charter, or was provided for by the general law. Per VORIES, JUDGE, dissenting.—State, ex rel, v. Green County, 536.

11. *Railroads, subscription to—Charter of Kansas City, G. & L. S. R. R.—Act of March 21st, 1868—Statute, construction of—Branch R. R.—Constitution.*—The act of March 21st, 1868, did not enlarge the power of County Courts to subscribe to the stock of the Kansas City, G. & L. S. R. R. under its charter, and authorize them to subscribe for special stock in the branch road proposed to

BONDS, RAILROAD, continued.

be built. Besides, such construction would be contrary to the Constitution then in force.—*Id.*

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## C.

CLARK COUNTY; See Bonds, Railroad, 3, 4.

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1. *Contracts—Illegality—Void.*—A contract is void, when the consideration is illegal, in whole or in part, and it is immaterial whether the contract disclosed such illegality, or established it *aliunde*.—Sumner v. Sumner, 340.

2. *Contracts—Sales—Illegal intent—Knowledge of—Recovery.*—Apart from felonies or crimes involving great moral turpitude, the mere knowledge of the lender or vendor, that the money loaned, or property sold, is designed to be applied to an unlawful purpose, will not prevent a legal recovery based on such loan or sale.—Howell v. Stewart, 400.

3. *Leases–Mining–Regulations–License to continue mining.*–In 1838, the proprietors of mine La Motte promulgated certain rules and regulations for the miners, who by signing them had a right to mine and extract minerals under their provisions for ten years. At the expiration of this time the proprietors made an agreement, by which miners might continue operations by subscribing thereto, on condition—among others named—that the agreement was to be revocable by the future action of the proprietors. *Held*, that the agreement was not a lease but a license, revocable at the pleasure of the proprietors. And where the miner, after the license was revoked, resumed work and extracted mineral without the consent of the proprietors, he was a mere wrong doer and acquired no title to the mineral by such wrongful act.—Lunsford v. La Motte Lead Co., 426.

4. *Deeds–Seal–Scrawl–When necessary–Intention of parties.*—Where a deed purports to be executed under the hands and seals of all the parties, and is acknowledged as the deed of all, it is not necessary that a separate seal shall be placed opposite each name. If it appears that the seal affixed is intended to be adopted as the seal of each, it is sufficient.—*Id.*

See Bonds Railroad; Conveyances; Equity, 6; Evidence, 1; Frauds, statute of, 1, 2; Infancy, 2, 3, 4; Mortgages and Deeds of Trust; Railroads, 13, 14.

CONVEYANCES; See Contracts, 3, 4; Fixtures, 1, 2, 3; Fraudulent Conveyances; Infancy, 2; Land and Land Titles; Limitations, 3, 4; Sheriffs' Sales, 1, 2.

CORPORATIONS.

1. *Corporations—Double liability clause, repeal of—Liability of Stockholder.*—A stockholder in a corporation, who becomes such after the repeal of the

CORPORATIONS, continued.

double liability clause in the State constitution of 1865, (See Art. VIII, § 6) is not liable in double the amount of his stock, for debts owing by the corporation prior to the repeal.—Ochiltree v. Iowa R. R. Co., 113.

2. *Corporations—Suits against, where to be brought—Construction of Statute.*—Suits against corporations can be brought as provided by the statute (W. S., 294, § 28), either in the county where the cause of action accrued, or in the county where such corporations have or usually keep an office or agent for the transaction of their usual and customary business, at the option of the plaintiff. Section 26 (W. S., 294,) provides for an enlargement and extension of service, by issuing process to a different county from where the suit is brought, when the officers of the company do not reside there. Mikel v. St L., K. C. & N. R. W. Co., 145.

3. *Corporations—Municipal purposes—Forest Park—Taxation, special and general.*—Under the provisions of the act to establish Forest Park, (Sess. Acts, 1872, p. 253) a district outside the city of St. Louis was incorporated. The commissioners created under it and having its exclusive management and control in no instance resided within its boundaries. Those owning lands within it were to be taxed for its establishment and support, against their consent, by persons having no interest in common with them. It was declared to be "for a municipal purpose of great importance to the city of St. Louis, conducive alike to the dignity and character of the city, and the recreation, health and enjoyment of its inhabitants." But the inhabitants of St. Louis were not to be taxed in anywise on account of it. *Held*, 1st. That the park was not established for "municipal purposes" within the meaning of § 4, Art VIII, of the State Constitution; 2nd. That it authorizes a special tax for a purpose of a general public character; and that for these reasons the act was void.—State *ex rel.*, v. Leffingwell, 458.

4. *Constitution—Corporations for municipal purposes—Meaning of term.*—A corporation, "for municipal purposes," as contemplated by §§ 4, 5, Art. VIII of the State Constitution, is either a municipality, such as a city or town, created expressly for local self-government with delegated legislative powers, or it may be a sub-division of the State for governmental purposes, such as a county, a school or road district, etc.; but it must embrace some of the functions of government, local or general; and no corporation not exclusively designed for this end can be properly denominated a municipal corporation.—*Id.*

5. *Constitution—Municipalities—Corporations, independent of.*—The Constitution did not contemplate that corporations, independent of a city government, should perform any of its functions.—*Id.*

6. *Revenue—Taxation—Street openings—Public Park.*—The doctrine which justifies special taxation against adjoining property holders for supposed benefits, as in the matter of street openings, has no application to public parks. A lot holder has a property interest, or easement, in the adjoining street, independent of the public parks. Not so, however, with lots fronting on public parks.—*Id.*

7. *Corporations—Notices to—How served.*—Notices can be served on corporations only in the mode pointed out by statute.—Cosgrove v. Tebo & N. R. R. Co., 495.

See Bonds, Railroad, 6, 7, 8, 9, 10, 11; Corporations, Municipal; Mechanic's lien, 1, 2; Railroads.

CORPORATIONS, MUNICIPAL.

1. *Corporations, municipal—Public improvements, power of subscription to.*—Municipal corporations have no inherent right of legislation, and can only subscribe for stock in public improvements, when such power is given to them by the Legislature and when the Constitution of the State does not prohibit it.—State, ex rel, v. Greene Co., 540.

CORPORATIONS, MUNICIPAL, continued.

2. *Corporations, municipal—Bonds—Authority to issue—Innocent holders.*—Municipal corporations having no inherent power to issue bonds, their power to issue bonds is a question of law of which all must take notice at their peril, and there can be no innocent holders, without notice, of such bonds.—*Id.*

See Bonds, railroad, 7; Forest Park; Hannibal, City of; St. Louis, City of.

COUNTY SEATS, REMOVAL OF.

1. *Elections—Removal of county seat—"Two-thirds" vote—Construction of Constitution.*—The State Constitution, Art. IV. § 5, prohibits the removal of a county seat unless "two-thirds of the qualified voters shall vote in favor of such removal," and the same instrument provides for the registering of voters. The statute relating to the same subject, (Wagn. Stat., 405, § 22) requires a two-thirds vote of the "legally registered voters," to warrant the transfer. *Held*, that two-thirds of the votes cast at an election on the question of removal, would be insufficient, under the law, to authorize the change, unless they numbered two-thirds of all the qualified voters of the county.—State, *ex rel.*, Dobbins v. Sutterfield, 391.

COURT, COUNTY; see Bonds, railroad; Roads, 1, 2.

COURT, PROBATE; see Administration; Wills.

COURT, UNITED STATES; See Bonds, railroad, 1

CRIMES AND PUNISHMENTS.

1. *Criminal law—Larceny—Intent.*—A servant gave away certain old tools of his employer as a matter of charity. *Held*, not larceny. The act lacked the criminal intent.—State v. Fritchler, 424.

See Practice, criminal; Statute, construction of, 2.

## D

DAMAGES.

1. *Statute, construction of—Death of child, damages for—Pecuniary loss—Funeral expenses.*—Under the statute (Wagn. Stat., 520, § 4), the damages for the killing of one's child are not restricted to the mere pecuniary loss. Such construction would make the words—"having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect, or default"—wholly meaningless. Also the funeral expenses of the child are a part of the damages.—Owen v. Brockschmidt, 285.

2. *Damages—Satisfaction—Acceptance of judgment against one tort-feasor.*—The acceptance of a verdict and judgment against one tort-feasor is not conclusive evidence of a compromise of a claim for damages, and should be left to a jury, under proper instructions, for their decision.—*Id.*

3. *Damages—Injuries by reason of bad streets combining with other causes.*—If the driver of a horse is in the exercise of ordinary care and prudence, and injuries done the animal are attributable to the insufficiency of the street conspiring with some accidental cause, the municipality is liable in damages.—Hull v. City of Kansas, 599.

See Parent and child, 2; Railroads, 3, 4, 5, 6, 7; Slander.

DEDICATION TO PUBLIC USE.

1. *Dedication of Land to the public—Subsequent condemnation.*—A dedication for an alley by acts *in pais* being usually uncertain of proof and inconclusive as to the public, is no defense against a proceeding by the proper authorities to condemn the property to public uses for the same purpose.—Rogers v. City of St. Charles, 229.

2. *Condemnation of land, costs of—Imperfect dedication—Constitutionality.*—There is a manifest hardship in compelling a property owner to pay the costs of a condemnation in which he gets nothing beyond the benefits derived from the improvement. But, *semble*, that there is no constitutional obstacle to this

DEDICATION TO PUBLIC USE, continued.

in a case where the owner, having undertaken, and still intending to dedicate, yet refuses to sign a relinquishment which would make his imperfect dedication conclusive and so avoid the proceedings.—*Id.*

DEPOSITIONS; See Evidence, 3.

DESCENTS AND DISTRIBUTIONS; See Wills, 4, 5,

DOGS; See Railroads, 13.

DOWER.

1. *Dower—Adultery—Statute, construction of.*—A. moved to Missouri, intending to purchase land and establish his home there. His wife declined to accompany him, saying that she might not like his new home. It was finally agreed, that he, if he purchased land, should come for, or send after, her. The wife afterwards committed adultery with one man, and subsequently married another, knowing that her first husband was still alive. She never joined her first husband, and was living with the second husband when she brought suit for dower in the land of her first husband. *Held*, that the separation must be considered as voluntarily made on her part, and her subsequent conduct forfeited under the statute (Wagn. Stat., 542, § 20,) her claims on her first husband's estate for dower.—McAllister v. Novenger, 251.

2. *Dower—Separation—Adultery—Reconciliation—Statute, construction of.*—If a husband and wife voluntarily separate, or the wife willingly and voluntarily lives apart from her husband, and afterwards lives in adultery, and no subsequent reconciliation takes place, she is barred from claiming dower in her deceased husband's estate. (Wagn. Stat., 542, § 20.)—*Id.*

See Wills, 2.

## E.

EJECTMENT; See Limitations, 3, 4; Mortgages and Deeds of Trust, 1.

ELECTIONS.

1. *Elections—Registered voters, rejection of—Practice, civil—Trials—Evidence.*—The judges of an election have the right under the law to reject registered voters, and in a contest for an elective office the presumption is, that such voters were rightly rejected, unless the contrary is shown by the party claiming such rejection to have been illegal and improper.—Zeiler v. Chapman, 502.

2. *Elections—Non-registered voters—Count.*—The votes of persons not registered cannot be counted at an election.—*Id.*

3. *Elections, validity of—Registering officers—Failure to register the voters.*—Where prior to an election the registering officers fail to register the voters as required by law, the election subsequently held is void.—*Id.*

See Bonds, Railroad, 3, 4; County Seats, removal of.

EQUITY.

1. *Equitable mortgage—Vendor's lien, etc.*—An instrument of writing not under seal, and not acknowledged, but otherwise in the shape of a mortgage, given by the vendor of land to secure the purchase money, has the same effect as a vendor's lien.—Gill v. Clark, 415.

2. *Equity suits—Instructions in, improper.*—In equity suits, no declarations of law are proper, and if made will be disregarded by this court.—*Id.*

3. *Non-suit in equity will not bring law and fact up to the Supreme Court.*—A non-suit with leave to move to set it aside, will bring before the Supreme Court the questions of law and fact passed upon by the trial court, only when the non-suit is taken in a case at law. In equity cases, the court below must adjudicate upon the law and the facts, in order to bring them up on appeal or writ of error.—*Id.*

4. *Practice, civil—Witnesses, examination of—Time of, in equity proceedings.*—In equity proceedings the chancellor may in his discretion examine witnesses before the case is taken up.—Morey v. Staley, 419.

EQUITY, continued.

5. *Equity—Evidence—Supreme Court.*—In equity suits, the Supreme Court is not bound by the finding, upon the evidence, in the lower tribunal.—*Id.*

6. *Equity—Contracts—Certainty—Specific performance.*—A Court of Equity will not decree the specific performance of a contract, unless it is established with reasonable certainty, having regard to its subject matter and to the circumstances under which, and with regard to which, it was entered into.—Foster v. Kimmons, 488.

7. *Administrator—Demand allowed by collusion—Sale of lands—Bill in equity, to postpone.*—Where a claim against an estate is allowed, and land belonging thereto is about to be sold to satisfy the allowance, through fraud and collusion betweeen the administrator and the claimant, a bill in equity by the heirs to set aside the allowance and postpone the sale is a proper remedy, notwithstanding that an action of damages would lie against the administrator on his bond. Such action would sound only in damages and would fail to reach the land. Jurisdiction by a court of equity is not ousted in such case, because a remedy exists at law.—Stewart v. Caldwell, 536.

8. *Injunction—Cloud on title, etc.*—Injunction will lie to restrain the sale of land where a cloud would be thereby thrown upon the title of plaintiff in the injunction, although no title would in fact pass to the purchaser at the sale.—Vogler v. Montgomery, 577.

See Fraudulent conveyances; Land and Land Titles, 1, 2, 4, 5, Mortgages and Deeds of Trust, 1; Practice, civil—Pleading, 1; Practice, Supreme Court, 1.

ESTOPPEL; See Bonds, Railroad, 3; Railroads, 12; Wills.

EVIDENCE.

1. *Evidence—Admissions—Hearsay, etc.*—In a suit brought on the parol promise of defendant to pay for stock sold to "A.," although one of the plaintiffs testified, that he knew nothing about the contract with the defendant, yet in cross-examination it would be proper to show by him, that on a former occasion he had testified that it was his understanding, that "A." had purchased the stock and that defendant had become his surety. Such testimony was competent as an admission on the part of plaintiff.—Glenn. v. Lehnen, 45.

2. *Witnesses—Statute touching—Party dead, other party may testify as to what.*—In a suit based upon a series of contracts and transactions, the fact that a party to the suit made some of the contracts with one since dead, will not, under the Witness Act.(W. S., 1372, § 1), disqualify him from testifying to other transactions occurring subsequent to the decease.—Poe v. Domic, 119.

3. *Depositions, notice of—Service on attorney who was co-defendant.*—Notice of deposition served upon one who was, the attorney of record of all the defendants, is sufficient service on them, and is in nowise invalidated by the fact that the attorney was also co-defendant.—*Id.*

4. *Practice, civil—Evidence—Corporate existence—Appeal bond.*—The appeal bond given by the appellant, in which appellant was a party by its corporate name signed by its president and secretary, is admissible in evidence to prove its corporate existence.—Transier v. St. L., K. C. & N. R. Co., 189.

5. *Practice, criminal—Evidence—Confessions, when admissible.*—The officers of the law went to A. and told him that all they wanted was to recover the goods stolen, and if he would tell them where they were, so that they could get them, that that would be the end of the matter, and nothing further would be done. A. informed them, whereupon he was arrested, and was convicted on this confession. *Held*, that this confession was involuntary, being induced by the flattery of hope and a promise of immunity from prosecution, and was inadmissible in evidence.—State v. Hagan, 192.

6. *Practice, civil—Trial—Evidence—Unstamped agreements.*—A written agreement, not stamped as the law requires, is admissible in evidence upon a stamp being affixed and cancelled.—Boly v. Lake, 201.

EVIDENCE, continued.

7. *Practice, civil—Trial—Witnesses—Husband and wife—Statute, construction of.*—The wife is a competent witness in a suit, when she is the real, and her husband only a nominal, party in interest (Wagn. Stat., 519-20, § 2).—Owen v. Brockschmidt, 285.

8. *Husband and wife—Witnesses for each other—Agency.*—The husband is admissible as a witness in behalf of his wife concerning matters wherein he acted as her agent.—Chesley v. Chesley, 347.

9. *Evidence Experts, opinions of, as to market value of dogs.*—Experts may be allowed to give their opinions as to the marketable value of dogs, the opinions being based either on actual sales or their general observation and experience.—Cantling v. H. & St. Joe R. R. Co., 385.

10. *Practice, criminal—Evidence—Confessions.*—In order that a confession may be received in a criminal case, it must be voluntary; it will be excluded, if it was induced by a promise of benefit or favor, or threat of intimidation or disfavor by a person having authority in the matter.—State v. Jones, 478.

11. *Practice, criminal—Confessions—Admissibility of.*—When a confession has once been obtained by means of hope or fear, subsequent confessions are presumed to come from the same motive, and are inadmissible, unless it is shown that the original motives have ceased to operate.—*Id.*

12. *Practice, criminal—Confessions—Artifice.*—Confessions are not inadmissible, because produced by artifice; *e. g.*, by persuading the prisoner, that his accomplices were in custody, or that they had divulged the facts relative to the crime.—*Id.*

13. *Evidence—Res gestæ—Possession—Delivery—Statements.*—The statements of one in possession of personal property, when delivering it to another, are admissible in evidence as a part of the *res gestæ* and explanatory of the transaction.—Colt v. LaDue, 486.

See Administration, 8; Bonds, Judicial, 1; Elections, 1; Equity, 4, 5; Forcible entry and detainer, 1, 5; Land and land titles, 3; Partnership, 4; Practice, civil—New trials, 1; Practice, criminal, 2, 15, 28; Railroads, 5, 15; Slander, 1, 3, 4.

EXECUTION; See Fraudulent conveyances, 1, 2; Justices' courts, 1; Sheriffs' sales, 1, 2, 3, 4.

EXPERTS; See Evidence, 9

## F.

FENCES; See Railroads, 4, 5, 7.

FIXTURES.

1. *Conveyances—Real estate—Fixtures—Temporary removal.*—A conveyance of real estate carries with it the fixtures attached to the property and those which have been removed merely for a temporary purpose.—Curry v. Schmidt, 515.

2. *Mortgages and deeds of trust—Fixtures, erection of—Sale—Whose property.*—If a mortgagor erects improvements on, or attaches fixtures to, the mortgaged premises, they become the property of the mortgagee for the payment of his debt; and if the property is sold under the mortgage or deed of trust, they become the property of the purchaser.—*Id.*

3. *Mortgages and deeds of trust—Fire—Removal of fixtures—Sale.*—After certain real estate was conveyed by deed of trust, a fire occurred, which burned down the improvements, and some of the fixtures were removed. Afterwards, the trustee sold the property under a deed of trust, describing it in his deed as in the deed to him. *Held*, that by such sale, no intention to the contrary appearing, the removed fixtures were not sold; that the trustee might have sold these fixtures as personal property, but had no right to sell them merely by selling the ruined premises.—*Id.*

FORCIBLE ENTRY AND DETAINER.

1. *Forcible entry and detainer—Possession—Entry—Cutting timber—Chain of evidence.*—The mere entry upon land and cutting timber is not of itself sufficient to sustain an action of forcible entry and detainer, but in connection with other circumstances it may form a very material link in the chain of evidence going to establish possession.—Powell v. Davis, 315.

2. *Forcible entry and detainer—Possession—Intruder—Authority or title, lack of.*—Where a party occupies as a mere intruder, he will be confined to the land actually possessed; and where the reliance is on possession only, without exhibiting or claiming authority or title, he will be restricted to what he actually occupies.—*Id.*

3. *Forcible entry and detainer—Color of title—Possession of part.*—One in actual possession of a part of a tract of land, holding the whole under claim and color of title, will in law be held to be in possession of the remainder.—*Id.*

4. *Forcible entry and detainer—Possession of farms—Separate timbered land—Indicia of possession.*—Persons owning timbered land, situated separate and apart from their farms, who are accustomed to use it for the purpose of cutting wood and obtaining rails, exhibit such visible indicia of possession, as to authorize and justify the finding of an actual possession.—*Id.*

5. *Forcible entry and detainer—Possession of land, how evidence.*—The owner is not always bound to be upon the land, either by himself or agent. An entry with the intention of permanent occupation, and clearing and fitting the land for cultivation, will be sufficient.—*Id.*

6 *Forcible entry and detainer—Disseizin—Title.*—In an action of forcible entry and detainer the defendant cannot raise the question of title when he is in by disseizin.—May v. Luckett, 437.

7. *Forcible entry and detainer—Landlord and tenant—Sheriff's sale of tenant's interest—Disseizin—Statute, construction of* —A. leased premises to B., who sub-let them to C. At an execution sale against B., A. purchased B.'s interest in the premises, and took a sheriff's deed therefor. A. requested C. to attorn to him or surrender possession to him; C. refused to do so, but locked up the premises, and left them before the expiration of the lease. A. took possession the next day. *Held*, that A. obtained possession of the premises wrongfully, and without force, by disseizin, and, after a written demand for the premises from B., was guilty of unlawful detainer under the statute (Wagn. Stat., 642, § 3).—*Id.*

FOREST PARK.

1. *Corporations—Municipal purposes—Forest Park—Taxation, special and general.*—Under the provisions of the act to establish Forest Park, (Sess. Acts, 1872, p. 255) a district outside the city of St. Louis was incorporated. The commissioners created under it and having its exclusive management and control in no instance resided within its boundaries. Those owning lands within it were to be taxed for its establishment and support, against their consent, by persons having no interest in common with them. It was declared to be "for a municipal purpose of great importance to the city of St. Louis, conducive alike to the dignity and character of the city, and the recreation, health and enjoyment of its inhabitants." But the inhabitants of St. Louis were not to be taxed in anywise on account of it. *Held*, 1st. That the park was not established for "municipal purposes" within the meaning of § 4, Art VIII, of the State Constitution; 2nd. That it authorizes a special tax for a purpose of a general public character; and that for these reasons the act was void.—State *ex rel.*, v. Leffingwell, 458.

2. *Constitution—Corporations for municipal purposes—Meaning of term.*—A corporation, "for municipal purposes," as contemplated by §§ 4, 5, Art. VIII of the State Constitution, is either a municipality, such as a city or town, created expressly for local self-government with delegated legislative powers, or it may be a sub-division of the State for governmental purposes, such as a county, a school or road district, etc.; but it must embrace some of the functions of government, local or general; and no corporation not exclusively designed for this end can be properly denominated a municipal corporation.—*Id.*

FOREST PARK, continued.

3. *Constitution—Municipalities—Corporations, independent of.*—The Constitution did not contemplate that corporations, independent of a city government, should perform any of its functions.—*Id.*

4. *Revenue—Taxation—Street openings—Public Park.*—The doctrine which justifies special taxation against adjoining property holders for supposed benefits, as in the matter of street openings, has no application to public parks. A lot holder has a property interest, or easement, in the adjoining street, independent of the public parks. Not so, however, with lots fronting on public parks.—*Id.*

FRAUD; See Administration, 9; Frauds, Statute of; Fraudulent conveyances.

FRAUDS, STATUTE OF.

1. *Statute of frauds—Original and collateral liability.*—The question whether a verbal contract comes within the Statute of Frauds or not, depends wholly upon the agreement. If a party agrees to be originally bound, the contract need not be in writing; but if his agreement is collateral to that of the principal contractor, or is that of a guarantor or a surety for another, the agreement must be in writing. It is immaterial in such case whether the promise is made prior to the passing or delivery of the consideration or afterwards; in either case the contract must be in writing; and in the latter must have a new consideration to uphold it.—Glenn v. Lehnen, 45.

2. *Contracts—Partial performance—Frauds, statute of—Specific performance——Deeds—Undue influence.*—A. made a deed to his daughter B. for certain lands, but retained the deed, showing it to B. and her husband C., saying that she should have it at his death, but he wanted them to come and take charge of the property and live on it. B. and C. came and lived on the property and made improvements, and afterwards, hearing they had no title thereto, requested A. to give them the deed, threatening, in case of refusal, to leave the land. A. finally gave them the deed, but took a conveyance of a part of the land, including the improvements, from them to him for his life. A. afterwards brought suit to set aside his conveyance, on the ground of undue influence. *Held*, that if B. and C. had remained on the land till A.'s death, they could have compelled his heirs to specifically perform the contract and convey the land to B., that A. only did in advance what he intended to do at his death, and that there was no undue influence exerted.—Bowles v. Wathan, 261.

FRAUDULENT CONVEYANCES.

1. *Fraudulent conveyances—Resulting trusts—Sale on execution.*—When one makes a conveyance of his lands in order to hinder, delay and defraud his creditors, there is created thereby a resulting trust in favor of his creditors, and such property can be sold on an execution against him. Ryland vs. Callison, 513.

2. *Fraudulent conveyances—Equity—Proceedings to set aside—Purchaser at execution sale.*—A purchaser of B.'s land at execution sale will occupy as advantageous a position as would a creditor of B., in proceedings to set aside a prior conveyance by B. of this land on account of fraud.—*Id.*

See Homestead, 1.

## G.

GENERAL ASSEMBLY; See Legislature.

GREENE COUNTY; See Bonds, Railroad, 6, 7, 8, 9, 10, 11.

## H.

HANNIBAL, CITY OF.

1. *Corporations, municipal—Hannibal, City of—Wharves, altering and extending—Statutes, construction of.*—The power to alter wharves, given to the City of Hannibal (Amended Charter of 1860–1), includes a power to extend or diminish them.—City of Hannibal v. Winchell, 172.

HOMESTEAD.

1. *Homestead exemption—Construction of statute—Claim not made by housekeeper—Fraudulent conveyance by.*—Under § 2 of the act concerning Homesteads, (Wagn Stat., 697,)where a homestead is claimed, the sheriff cannot proceed with his levy until he has ascertained by appraisers in the mode directed by the act, the extent and value of the premises, and that they are beyond the limit protected against executions. And the claim is not lost when not asserted by the housekeeper or head of the family, or by reason of the fact that he had theretofore fraudulently conveyed away the property—Vogler v. Montgomery, 577.

HUSBAND AND WIFE; See Dower, 1, 2; Evidence, 7, 8.

## I.

INCEST; See Practice, criminal, 1, 2.

INDORSEMENT; See Bills and Notes.

INFANCY.

1. *Infants—Conveyances to, etc.*—Conveyances to infants are not void, but merely voidable.—Baker v. Kennett, 82.

2. *Infant—Conveyances to—Acts of disaffirmance—What sufficient.*—An infant, who had taken a deed of land and given his note for the purchase money, made an attempt to disaffirm the contract before his majority, and again within a few days thereafter, and, upon the refusal of the vendor to agree thereto, offered to give him $2,000 together with the improvements erected by himself on the land, by way of compromise; and abandoned the premises and left them in a position for the vendor to occupy it at any time he saw fit. *Held,* that the disaffirmance was sufficiently speedy and unequivocal to avoid the contract.—*Id.*

3. *Infants—Contracts by—Ratification of, after majority—What sufficient and what not.*—To constitute a ratification of an infant's contract, a mere acknowledgment that the debt existed, or that the contract was made, is not sufficient. There need not be a precise and formal promise, but there must be a direct and express confirmation and a substantial promise to pay the debt or fulfill the contract. And the promise must be made with a knowledge of the facts, and with a deliberate purpose of assuming a liability from which the party knows that he is discharged.—*Id.*

4. *Infant—Note by—Disaffirmance of—Sureties, etc.*—Where an infant gives his note for land purchased, and at his majority disaffirms the contract the sureties on his note will not be liable.—*Id.*

5. *Limitations, statute of—Infancy—Entry—Action may be commenced, when.*—Parties to a suit for the recovery of lands, who were infants when their right of action or entry first accrued, may commence their action or make an entry within three years after their disability has been removed, if that event does not occur more than twenty-four years after the accrual of the right. Poe v. Domic, 119.

6. *Statutes—Constitutionality of—Minors declared of age.*—It is too late now to question the constitutionality of an act of the Legislature, passed prior to 1865, declaring a minor of age and legally competent to transact his own business.—Shipp v. Klinger, 238.

See Parent and Child, 1.

INJUNCTION; See Equity, 8; Practice, civil, parties, 2.

INSANITY; See Practice, criminal, 11.

INSTRUCTIONS; See Equity, 2; Practice, civil, Trials, Practice, criminal, 7.

## J.

JEOFAILS.

1. *Practice, civil—Errors of the clerk—When corrected.*—The mistakes and clerical errors of the clerk of the circuit can be corrected at any time. Coop v. Northcutt, 128.

JUDGMENT.

*Judgment, final—What is—Mandamus from Circuit to County Court.*—The judgment of a circuit court against the justices of the county court, granting a writ of mandamus on them to appoint commissioners to select a cite for a county seat, is a final judgment from which appeal will lie, notwithstanding the fact, that a proceeding is at the time pending in the county court in regard to the establishment of a county seat. The judgment is a finality as to the circuit court. (McVey v. McVey, 51 Mo., 406; Thomas v. Drennan, 41 Mo., 289.) This proposition is not in conflict with Tetherow v. Grundy Co., 9 Mo., 118. State *ex rel.* Dobbins v. Sutterfield, 391.

See Attachment, 1; Justices' Courts, 1; Practice, civil, trials, 12; Sheriffs' sales, 3.

JURISDICTION.

1. *Bonds, railroad—Coupons—Suit on, in U. S. Courts—Jurisdiction—Aggregate amount.*—In suit to recover coupons on railroad bonds issued by a County Court, the question, whether the amount sued on is sufficient to bring it within jurisdiction of the Circuit Court, is to be determined by the aggregate amount of the coupons. Smith, v. The County of Clark, 58.

2. *Practice, civil—Circuit Court, jurisdiction of—Aggregate amount claimed in all the counts.*—A suit can be brought in the Circuit Court, provided the aggregate amount claimed in all the counts of the petition, is sufficient to give the court jurisdiction. [Smith v. Clark County, *ante p.* 58.] Fickle v. St. Louis, Kansas City and Northern Railway Company, 219.

See Administration, 9; Corporations, 2; Practice, Criminal, 16; Presbyterian Church, 1, 3; Railroads, 6; Roads, 1, 2.

JURY; See Practice, civil trials, 2; Practice, criminal, 3, 4, 5, 28.

JUSTICES' COURTS.

1. *Justices' Courts—Judgment—Execution—Motion to quash, etc.*—The entry on a justice's docket showed suit brought against Fea, Brother & Turnbull, and judgment against defendants "as a firm, or against Joseph Fea and William Turnbull, as the summons was served on them personally." The execution issued under it recited a judgment and ordered a levy against the three defendants. *Held*, that although the judgment bound only the two defendants named, yet under the statute (W. S., 839, § 15), the execution should not be quashed, but should be amended, so as to conform its recitals to the law, and should be directed against the defendants who had been personally served. Caldwell v. Fea, 55.

2. *Practice, civil—Appeal from Justice—Entry of appearance—Trial.*—In a cause appealed from a justice of the peace, the appellee, who has failed to enter his appearance, cannot be forced to trial at the first term of the court. Chrismer v. The St. Louis, Kansas City and Northern Railway Company, 152.

3. *Practice, civil—Appeal from a justice of the peace—Amendments in the Circuit Court—Constable's return.*—In an appeal case from a justice, the Circuit Court can allow the constable's return to be amended: for the Circuit Court can do whatever the justice can.—Transier v. St. L., K. C. & N. R.W. Co., 189.

4. *Practice, civil—Evidence—Corporate existence—Appeal bond*—The appeal bond given by the appellant, in which appellant was a party by its corporate name signed by its president and secretary, is admissible in evidence to prove its corporate existence.—*Id.*

5. *Practice, civil—Appeal from Justices—Entry of appearance—Right of continuance.*—In a cause appealed from a justice, but not on the day of judgment,

JUSTICES' COURT, continued.

if the appellee fail to enter his appearance on or before the second day of the term, the cause is not triable at the first term, unless by consent of both parties. [Nay v. Han. & St. Joe. R. R., 51 Mo., 575.]—*Id.*

See Railroads, 6.

## L.

LAND AND LAND TITLES.

1. *Lands and land-titles—Misdescription in deed—Subsequent deed correcting—Titles, equitable and legal.*—Land was conveyed to A. but it was misdescribed in the deed. By a subsequent deed this mistake was corrected. *Held*, that the first deed gave him an equitable title, which the second deed perfected into a legal title.—Fitch v. Sosser, 672.

2. *Lands and land-titles—Equitable title—Possession—Farm—Timber-land.*—A. having an equitable title to 200 acres of land, consisting of a prairie-farm of 160 acres, and 40 acres of timber-land a mile or two away from it, leased the farm to tenants, allowing them to cut timber for the use of the farm and firewood from the 40 acre tract. *Held*, that the only value of the timber-land was in its use for such purposes, that it was not designed for cultivation or inclosure, and that A. was in possession of both tracts.—*Id.*

3. *Lands and land titles—Evidence—Declarations asserting title.*—In a suit for the title to land, the declarations made by a party in possession, asserting his title are not competent testimony.—Morey v. Staley, 419.

4. *Equity—Conveyance—Title—Actual and constructive notice.*—Where the title to a tract of land was in the son, who made a power of attorney, authorizing his father to convey and the father does convey; but afterwards, on non-payment of the purchase money, he takes back the title to himself, and has such deed recorded, in a suit in equity to establish the son's title, the question in regard to an acquiescence of the son in such a condition of the title, is one of actual knowledge and not of such constructive notice as our statusot give to recording a deed.—*Id.*

5. *Land and land titles—Conveyances—Heirs.*—A conveyance of land to a grantee and his hsirs creates a fee simple title, both at law and in equity.—Mercier v. The M. R., Ft. S. and G. R. R. Co., 506.

See Forcible entry and detainer, Fraudulent conveyances, 1, 2; Limitation, 1, 3, 4, 5, 6; Mortgages and deeds of trust, 1; Sheriffs' Sales, 1.—*Id.*

LANDLORD AND TENANT.

1. *Forcible entry and detainer—Disseizin—Title.*—In an action of forcible entry and detainer the defendant cannot raise the question of the title when he is in by disseizin.—May v. Luckett, 437.

2. *Forcible entry and detainer—Landlord and tenant—Sheriff's sale for tenants interest—Disseizin—Statute, construction of.*—A. leased premises to B., who sub-let thom to C. At an execution sale against B., A. purchased B.'s interest in the premises, and took a sheriff's deed therefor. A. requested C. to attorn to him or surrender possession to him; C. refused to do so, but locked up the premises, and left them before the expiration of the lease. A. took possession the next day, *Held*, that A. obtained possession of the premises wrongfully, and without force, by disseizin, and, after a written demand for the premises from B., was guilty of unlawful detainer under the statute. (Wagn. Stat., 880, § 15).—*Id.*

3. *Landlord and tenant—Sales—Attornment—Statute, construction of*—When premises have been sold by the owner or by proceedings *in invetum*, the tenant thereof can attorn to the purchaser under the statute. (Wagn. Stat. 880, § 15.)—*Ib.*

See Forcible entry and detainer.

LEASE; See Contracts.

LEGISLATURE.

1. *Legislature—Contest for seats in—Costs, how adjusted.*—The contestee for a seat in the General Assembly of the State cannot have his action against the unsuccessful contestor for costs expended in the contest, where the same is carried on before the legislature. Section 58 of the Act touching Elections, (Wagn. Stat., 574,) applies only to contests had before the courts of the country.—Steele v. Wear, 531.

LICENSE; See Contracts, 3.

LIEN, MECHANICS'; See Mechanics' lien.

LIEN, VENDOR'S.

1. *Equitable mortgage—Vendor's lien, etc.*—An instrument of writing not under seal, and not acknowledged, but otherwise in the shape of a mortgage, given by the vendor of land to secure the purchase money, has the same effect as a vendor's lien.—Gill v. Clark, 415

LIMITATIONS.

1. *Limitations, statute of—Life estate of widow—Statute commences running, when*—The life estate of a widow in the lands of her deceased husband, prevents the running of the statute of limitations against his heirs, until after the time of the widow's death.—Carr v Dings, 95.

2. *Limitations—Presumption as to payment of debts.*—The common law presumption of the payment of a debt after the lapse of twenty years still exists notwithstanding our statute of limitations.—*Id.*

3. *Ejectment—Possession—Limitation.*—Open, notorious, peaceable, continuous and adverse possession of land for twenty years will give a title that will authorize a recovery in ejectment.—Dalton v. Bank of St. Louis, 105.

4. *Acknowledgment—Deed with defective—Adverse possession.*—A deed, notwithstanding a defective aeknowledgment, is good between the parties. It would constitute color of title, and enable persons in possession of land to avail themselves of title by adverse holding.—*Id.*

5. *Limitation, stutute of—Infancy—Entry—Action may be commenced, when.*—Parties to a suit for the recovery of land, who were infants when their right of action or entry first accrued, may commence their action or make an entry within three years after their disability has been removed, if that event does not occur more than twenty-four years after the accrual of the right.—Poe v. Domic, 119.

6. *Trusts and trustees—Limitations, statute of—Claim of title by trustee independent of the trust.*—When the trustee denies the trust and openly claims the trust property by a title independent of the trust and adversely to the claim of the beneficiary, the statute of limitations will run in his favor.—*Id.*

7. *Limitations, statute of—Section 7, Wagn. Stat. 197—Prospective.*—Section 7 of the Limitation Act (Wagn. Stat., 917) is prospective in its operation, and has no application to actions commenced, nor to cases where the right of entry accrued before it was enacted.—McCartney, Adm'r v. Anderson, 320.

See Administration, 8.

## M.

MAINTENANCE.

1. *Practice, civil—Motion pendente lite—Notice, of, etc.*—A court may in its discretion, hear a motion for support and maintenance *pendente lite* after a continuance of the cause, and without notice, and on the day of filing the motion.—Curtis v. Curtis, 351.

MALICE.—See Practice, criminal, 8, 10.

MANSLAUGHTER.—See Practice, criminal.

MECHANIC'S LIEN.

1. *Mechanics' lien—Notice to owners—Name of party claiming lien.*—A corporation, claiming a lien on certain property, gave notice to the owners thereof, stating its own name in full, but signed the notice with its abbreviated name, omitting "of St. Louis." *Held*, that the variation was not material, because the owners could not be misled thereby.—Mississippi Planing Mill v. Presbyterian Church, 520.

2. *Mechanic's lien—Account filed—Name of party claiming lien.*—A corporation claiming a lien against certain property, filed its verified account with the clerk of the court. This account did not state the full name of the corporation, omitting "of St. Louis," but referred to the notice given to the owners of the property where the full corporate name was given; the affidavit to the account used the full corporate name: *Held*, that the owners of the property were not misled, and that there was a substantial compliance with the law.—*Id.*

MINES AND MINING; See contracts, 3.

MISNOMER; See Mechanics' lien, 1, 2.

MORTGAGES AND DEEDS OF TRUST.

1. *Ejectment—Trustee's Sale—Proceedings in bankruptcy—Adjudication—Equity.*—The mere fact, that proceedings in bankruptcy, which had not proceeded to an adjudication, had been commenced against the grantor in a deed of trust will not invalidate a sale under said deed by the trustee; such sale would convey the legal title, and such title would be available in an action of ejectment.

QUERY, whether in a direct proceeding for that purpose, a court of equity would set aside such sale?—McGready v. Harris, 137.

2. *Mortgages and deeds of trust—Sales under—Disposition of proceeds.*—When a mortgage or deed of trust is given on property to secure the payment of notes maturing at different times, and the property, or a part thereof, is sold in accordance with the deed to satisfy one of the notes, the overplus, after satisfying the expenses of the trust and that note, must be held by the trustee subject to the same lien as the property was, even though the deed is silent as to the disposition of the overplus, and does not state that default in one note shall cause the others to become due and payable.—Huffard v. Gottberg, 271.

3. *Mortgages and deeds of trust—Sale of property en masse—When set aside.*—A trustee's sale of land *en masse* under deed of trust will not be set aside because the land was capable of easy division, unless the interests of the grantor were sacrificed by such sale.—Chesley v. Chesley, 347.

4. *Equitable mortgage—Vendor's lien, etc.*—An instrument of writing not under seal, and not acknowledged, but otherwise in the shape of a mortgage, given by the vendor of land to secure the purchase money, has the same effect as a vendor's lien.—Gill v. Clark, 415.

See Fixtures, 2, 3.

MURDER; See Practice, criminal.

N.

NEGLIGENCE; See Railroads, 5.

O.

OFFICERS; See Collectors; Sheriff.

P.

PARK, PUBLIC; See Forest Park.

PARENT AND CHILD.

1. *Parent and child—Child's earnings, claim to, how relinquished.*—The relinquishment of the father's claim to the earnings of his minor son may be established by direct evidence, or may be implied from circumstances.—Dierker to use of, etc. v. Hess, 246.

2. *Parent and child—Battery of child—Suit by parent—Loss of services—Exemplary damages.*—In a suit by a parent for battery of his child, evidence having been offered of loss of the services of the child, it is competent for the jury to look at all the circumstances attending the battery, and to award such damages as they may deem ample and reasonable to compensate the plaintiff, and also to vindicate his rights, and to prevent similar abuses in future.—Klingman v. Holmes, 304.

See Infancy.

PARTNERSHIP.

1. *Partnership—Share in profits—When p artrs.*—The single circumstance that one is to have a share in the profits, does not necessarily make him a partner. He must have some interest in the business or property of the business or trade, so as to give him a lien on the property for the protection of his interests or profits, and a control over the same. The interest in the profits must be mutual; each person must have an interest in the profits as a principal trader.—Campbell v. Dent, 325.

2. *Credit—Partnership, not bound—Partnership—Sale to member on personal credit—Partnership not bound.*—Where one elects to sell goods to a member of a firm on his individual credit, giving no credit to the firm, the co-partners will not be bound even if the goods purchased go into the partnership fund.—Gates v. Watson, 585.

3. *Practice, civil—Pleading—Partnership—When need not be pleaded.*—In an action for goods sold, plaintiff may show, without alleging the fact in his pleading, that defendant and another were partners, and that the contract was made by such other partner for the benefit of the firm in the usual course of business. (Under our statute such contract is both joint and several, and it is not necessary to a recovery that plaintiff should join all the partners as defendants.)—*Id.*

4. *Partners—Persons not, held as, when.*—In order to bind persons as partners it is unnecessary to show the partnership. It is sufficient to prove that they held themselves out as partners.—*Id.*

See Arbitration and Award, 2.

PENITENTIARY.

1. *Mandamus—State Auditor—Lessees of Penitentiary—Labor of convicts—Acts of March 20th and 22nd, 1873.*—The acts of March 20th and 22nd, 1873, are *in pari materia* and must be construed together, and under them the lessees of the penitentiary are entitled to pay for convict labor on the Capitol grounds and to the State Auditor's warrant therefor.—State *ex rel.* Perry v. Clark, 216.

POSSESSION; See Forcible entry and detainer.

PRACTICE, CIVIL.

1. *Practice, civil—Sheriff's returns—When amendable.*—Sheriff's returns may be amended at any time during the pendency of the suit, and it is not necessary that anything shall exist on the minutes or records to justify such amendments. They are even amendable at a subsequent term, on a proper state of facts, in support of the judgment.—Magrew v. Foster, 258.

2. *Practice, civil—Sheriff's returns—Contradiction of.*—A sheriff's return, that he has levied on certain property belonging to defendant, cannot be contradicted by the defendant in that suit by showing that he does not own the property.—*Id.*

3. *Practice, civil—Attachment—Defendant, how brought before the court.*—In attachment cases the law necessarily implies that the defendant may be brought before the court by personal, or other service of the summons, if he

PRACTICE, CIVIL, continued.

reside or can be found in the State, or the suit may be proceeded in by publication.—*Id.*

4. *Practice, civil—Motion pendente lite—Notice of, etc.*—A court may in its discretion hear a motion for support and maintenance *pendente lite* after a continuance of the cause, and without notice, and on the day of filing the motion.—Curtis v. Curtis, 351.

PRACTICE, CIVIL—ACTIONS.—See Administration, 6; Ejectment; Practice civil—Parties, 3; Quo Warranto; Revenue, 1, 2.

PRACTICE, CIVIL—APPEAL.—See Attachments, 1; Justices' courts, 2, 3, 4, 5; Practice, civil—New Trials; Practice, Supreme court.

PRACTICE, CIVIL—NEW TRIALS.

1. *Practice, civil—New trials—Newly discovered evidence Affidavit.*—The granting of a new trial on the ground of newly discovered evidence, is a matter largely resting in the sound discretion of the court trying the cause, and the overruling of the motion is no error, where the plaintiff's affidavit does not show due diligence, nor why he could not have procured this evidence at the trial.—Coop v. Northcutt, 128.

2. *Practice, civil—New trial, refusal of—When Supreme Court will interfere.*—The supreme court will not interfere with the discretion of lower courts, in refusing to grant a new trial, unless a strong case is made showing an improper exercise of discretion to the prejudice of the party complaining.—Tucker v. St. L., K. C. & N. R. W. Co., 177.

3. *Practice, civil—New trial—Surprise.*— A cause by agreement of parties, and by order of court, was set for a certain day of a subsequent term, but was called and tried the day before, in the absence of the defendant. It appeared by affidavits that the defendant appeared at the appointed time, ready to try the cause, when he first learned of the trial, and it also appeared that a witness informed the plaintiff's attorney during the trial that the defendant's attorney understood and informed witness that the cause was to be tried next day. *Held*, that the court should have granted a new trial on the ground of surprise.—*Id.*

See Practice, civil—Appeal; Practice, supreme court.

PRACTICE, CIVIL—PARTIES.

1. *Practice, civil—Parties—Persons in interest.*—Courts are not organized to decide abstract propositions of law, and the persons in interest must be brought before the court.—The State of Missouri *ex rel.*, Robinson v. Sanderson, 203.

2. *Railroads, subscription to—Bonds, taxes to pay interest on—County Court—Railroad—The State as plaintiff.*—In a suit to enjoin the collector from collecting taxes levied to pay the interest on bonds (alleged to be illegal) issued to a railroad, the county court who issued the bonds and levied the tax, and the railroad should be made parties thereto. The State through its proper officers can bring such suits.—*Id.*

3. *Practice, civil—Actions—Leased land—Trespass to—Who can sue.*—The owner of land can bring an action against a trespasser for cutting timber on it and carrying it away, though the land is then in the possession of his tenant.—Fitch v. Gosser, 267.

See Practice, civil—Pleading, 9; Railroads, 2, 4, 11; Revenue, 1, 2.

PRACTICE, CIVIL—PLEADING.

1. *Practice, civil—Petition—Specific Performance—Rents and profits.*—A claim for specific performance and for rents and profits may be united in the same bill.—Duvall vs. Tinsley, 93.

2. *Railroads—Accidents—Damages by cattle—Statement of cause of action—Double damages—Statute, construction of.*—In a suit for damages by a railroad, it appeared by the allegations and evidence that one of its trains was wrecked where the track ran through plaintiff's field; that there was no fence along the track; that the hogs and cattle in the train were necessarily

PRACTICE, CIVIL—PLEADING, continued.

turned into the field in the effort to extricate them from the wreck; that they were collected together and driven away, and that while in the fields they damaged the crops. There was no allegation that the damage was caused by the failure of the railroad to construct or maintain fences or cattle-guards, as required by law. *Held*, that in such case the statute (W. S. 310–11, § 43) did not contemplate the allowance of double damages.—Grau v. St. L., K. C. & N. R. R. Co., 240.

3. *Practice, civil—Pleading—Striking out—Discretion in, etc.*—Trial courts have some latitude of discretion in allowing or refusing permission to file pleadings out of time, and unless that discretion be abused or unsoundly exercised, no case is made for the interference of this court.—Cooney v. Murdock, 349.

4. *Practice, civil—Demurrer—Answer—When filing proper.*—Permission to file an answer during vacation was granted and a demurrer was filed instead. Afterwards the demurrer was, on motion, stricken out and defendant immediately offered to file his answer. *Held*, that if the answer had disclosed a meritorious defense, and no particular delay or hardship would have resulted, such action of the court would be error.—*Id.*

5. *Practice, civil—Pleading—Notes—Illegality of contract—Misdemeanor—Statute, construction of.*—In a suit on a note an answer alleging that the money was advanced for an illegal purpose is bad, if it does not allege that the money was so used; furthermore, when the act is made by statute (Acts of Feb. 26th, 1868, and Feb. 2nd 1872,) a misdemeanor, the intent to do the act is wholly immaterial.—Howell v. Stewart, 400.

6. *Practice, civil—Pleading—Answer—Demurrer—Motion to strike out.*—When the answer to a suit contains no defense, the plaintiff may demur to it or move to strike it out.—*Id.*

7. *Practice, civil—Pleading—Amendments—Meritorious defense—Supreme Court.*—The Supreme Court will not interfere with the discretion of lower courts in refusing to allow time to amend an answer, unless the record discloses a meritorious defense, which the court by its action precluded the defendant from availing himself of.—*Id.*

8. *Practice, civil—Pleading—Bonds—Breaches—General verdict.*—A suit on an administrator's bond alleged several breaches in not paying over money collected. *Held*, that there was substantially but one breach—the failure to pay over or account for money collected—and that a general verdict was proper.—State to use of Headlee, Admr. v. Shackelford's Adm'r, 518.

9. *Practice, civil—Pleading—Answer—Defect of parties.*—By answering to the merits, the defendant waives all objections on the score of defects of parties in the action.—Mississippi Planing Mill v. Presbyterian Church, 520.

See Administration, 10; Bonds, judicial, 3; Partnership, 3; Railroads, 6; Slander, 1.

PRACTICE, CIVIL—TRIALS.

1. *Instructions should be predicated on the evidence.*—Instructions should always be predicated on the evidence in the case to which they relate.—Glenn v. Lehnen, 45.

2. *Practice, civil—Chancery cases—Issues referred to jury—Whether other verdict can be examined in Supreme Court.*—The verdict of a jury, upon issues referred to it by the court in a chancery case, is not properly reviewable in the Supreme Court. The lower court may disregard the verdict, and decide upon the issues, or may refer them to another jury. (W. S., 1041, § 13.) Weeke v. Senden, 129.

3. *Practice, civil—Trials—Bonds, loss of—Parol testimony.*—When a bond is given in a cause and is afterwards lost, its contents may be proved in that cause by parol testimony.—Compton, *et al.*, v. Arnold, 147.

PRACTICE, CIVIL—TRIALS, continued.

4. *Practice, civil—Slander—Trials—General verdict—Several counts.*—In an action for slander, the petition containing several counts, a general verdict is proper, when the several counts contain the same slander uttered at different times.—Polston v. See, 291.

5. *Practice, civil—Trials—Evidence—Slander—Condition in life.*—The condition in life of the parties to a slander suit, is a proper subject of inquiry on the question of damages.—*Id.*

6. *Practice, civil—Trials—Slander—Evidence—Statements— Res gestæ.*—In an action of slander for charging plaintiff with stealing defendant's lumber, the declarations and acts of the plaintiff at the time of his taking the lumber are admissible in evidence, though the defendant was not present, as a part of the *res gestæ.*—*Id.*

7. *Practice, civil—Trials—Verdict—Slander—Crime—Plea of justification—What evidence required.*—In a slander suit for charging the plaintiff with the commission of a crime, wherein the defendant justifies the charge, the verdict must be for the plaintiff, if the jury have a reasonable doubt of the plaintiff's guilt.—*Id.*

8. *Practice, civil—Trials—Slander—Justification—Verdict—Preponderance of evidence.*—In an action of slander, when the answer justifies the language, the verdict should be in accordance with the preponderance of the testimony, as in other civil causes.—*Id.* Per SHERWOOD, Judge, dissenting.

9. *Practice, civil—Trials—Instructions—Slander.*— In an action of slander for charging the plaintiff with theft, an instruction to the jury to find for the defendant, if they find that the plaintiff, in person, or by agent, took away the property, is wrong, because it omits the essential ingredient of felonious intent. —*Id.*

10. *Practice, civil—Trials—Instructions, Confusing —Re-trial.*— When the instructions given on a trial must have confused and misled the jury, a new trial should be granted.—*Id.*

11. *Practice, civil—Pleadings—Bonds—Breaches—General verdict.*—A suit on an administrator's bond alleged several breaches in not paying over money collected. *Held*, that there was substantially but one breach,—the failure to pay over or account for money collected—and that a general verdict was proper.—State to use of Headlee v. Henslee, Adm'r of Schackelford, 518.

12. *Practice, civil—Special verdict—Judgment upon.*—On the finding of issues in the nature of a special verdict, the court has the undoubted right to render judgment.—White, Adm'r of Henly v. Henly, 592.

See Elections, 1; Equity, 2; Justices' Courts, 2; Slander, 1.

PRACTICE, CRIMINAL.

1. *Practice, criminal—Incest—Indictment, allegations of.*—In an indictment for incest with his daughter, it is not necessary to allege, that the defendant had carnal knowledge of the prosecutrix, knowing her to be his daughter.—State v. Bullinger, 142.

2. *Practice, criminal—Trial—Incest—Relationship, how proved.*—In trials for incest the relationship of the parties may be proved by reputation.—*Id.*

3. *Practice—Trials—Jury, separation of—New trials.*—The separation of the jury, even in criminal trials, is no ground for a new trial, when there is no ground to suspect that the jury has been tampered with.—Compton v. Arnold, 149.

4. *Practice, criminal—Trials—Calling the jury.*—The provision in the statute (W. S., 800, § 25,) that the clerk of the court in a criminal case shall call the jury to be impaneled, is directory.—State v. Holme, 153.

5. *Practice, criminal—Errors—Reversal.*—No error, that is not a violation of some positive rule of law, or which may not possibly prejudice the defendant, can be a ground for reversal on appeal.—*Id.*

6. *Practice, criminal—Trials—Errors—Impaneling the jury.*—In a criminal case the failure to call the first twelve names on the list for the jury, after the chal-

PRACTICE, CRIMINAL, continued.

lenges are exhausted, is a violation of the statute, (W. S., 800, § 25,) and the defendant having objected at the time to the course pursued, is a substantial error, and the case must be reversed.—*Id.*

7. *Practice, criminal—Instructions—Reversal.*—A cause will not be reversed, although unobjectionable instructions were refused, if those given completely covered the case.—*Id.*

8. *Practice, criminal—Murder—Malice—Presumption—Statute, construction of.*—Unless the circumstances from which the jury may presume malice, are proved, the law will presume under the statute (W. S., 445 § 1,) that the unlawful killing was murder in the second degree.—*Id.*

9. *Practice, criminal—Murder in the first degree.*—If the party killing had time to think, and did intend to kill, for a minute, as well as for an hour or a day, it is a deliberate, willful and premeditated killing, constituting the crime of murder in the first degree.—*Id.*

10. *Practice, criminal—Murder in the first degree—Malice, presumption of—Justification or palliation.*—As a general rule of law, every homicide is deemed malicious, unless it is shown that it was justified, excused or palliated; the proof of justification, excuse or palliation resting upon the accused, when the homicide is proven, unless evolved in the testimony produced by the accusing party.—*Id.*

11. *Practice, criminal—Defense of insanity—Question of fact.*—The defense of insanity in a criminal case is a question of fact for the decision of the jury. (State vs. Hundley, 44 Mo., 414.)

12. *Practice, criminal—Adultery—Killing wife or paramour—Mitigation.*—In order to mitigate to manslaughter the crime of killing the wife or her paramour by the husband, the husband must discover them in the act of adultery, unless the provocation was so recent and strong that he could not be considered at the time master of his own understanding.—*Id.*

13. *Practice, criminal—Unlawful killing—When reduced to manslaughter.*—In order to reduce the crime of unlawful killing of a person to manslaughter, the reason of the accused must at the time of the act be disturbed or obscured by passion to an extent, which might render a reasonable person liable to act rashly, without deliberation, and from passion rather than judgment, and generally, the provocation must occur in the presence of the injured party for then the law presumes that he acts upon sudden impulse.—*Id.*

14. *Practice, criminal—Trial—Imprisonment—Attempts to escape.*—In a criminal case, attempts to escape by the defendant after arrest are admissible in evidence.—State v. Williams, 170.

15. *Practice, criminal—Stolen property—Possession of.*—The recent possession of stolen property is presumptive evidence of the guilt of the possessor, and conclusive unless explained.—*Id.*

16. *Practice, criminal—Indictments—Perjury before grand jury—Averments—Jurisdiction over matters of inquiry.*—In an indictment for perjury before a grand jury, it is not necessary to allege that the grand jury had jurisdiction over the subject matter of the inquiry. (W. S., 477, § 7.)—State v. Keel, 182.

17. *Practice, criminal—Indictments—Venue.*—It is not necessary to state any venue in the body of an indictment. The venue stated in the margin is taken to be the venue for all the facts stated in the body of the indictment. (W. S., 1090, § 26.)—*Id.*

18. *Practice, criminal—Indictments—Perjury—Allegations—Materiality of testimony.*—In indictments for perjury, the facts, showing the materiality of the testimony, must be plainly and distinctly set forth.—*Id.*

19. *Practice, criminal—Evidence—Confessions, when inadmissible*—The officers of the law went to A. and told him that all they wanted was to recover the goods stolen, and if he would tell them where they were, so that they could get them, that that would be the end of the matter, and nothing further would be done. A. informed them, whereupon he was arrested, and was convicted on this con

PRACTICE, CRIMINAL, continued.

fession. *Held*, that this confession was involuntary, being induced by the flattery of hope and a promise of immunity from prosecution, and was inadmissible in evidence.—State v. Hagan, 192.

20. *Practice, criminal—Continuances.*—Applications for continuances are addressed to the sound discretion of the court trying the cause, and an appellate court will not interfere, unless such discretion appears to have been used unsoundly or oppressively.—State v. Burns, 274.

21. *Practice, criminal—Continuances—Affidavits—Due diligence.*—Where an affidavit was filed for a continuance in a criminal cause on the ground of the absence of witnesses, and it appeared that three continuances had been granted, and that the only subpœnas issued were issued on two occasions two days before the cause was set for trial, and the witnesses were not found: *Held*, that due diligence had not been exercised.—*Id.*

22. *Practice, criminal—Continuances—Newly discovered witnesses.*—An affidavit for a continuance, on the ground of the absence of parties discovered to be witnesses just prior to the trial, should be examined with rigid scrutiny.—*Id.*

23. *Practice, criminal—St. Louis county—Venire from the county—How summoned.*—The jury act for St. Louis county is peculiar, and does not contemplate the summoning of a jury from the county, consequently in a criminal cause it is competent for the marshal to summon such a jury, without receiving a list of the jurors from the jury commissioner.—*Id.*

24. *Practice, criminal—Application for change of venue—When applied for.*—An application for a change of venue in a criminal cause comes too late when the cause is called for trial, no previous notice having been given of the proposed application.—*Id.*

25. *Practice, criminal—Evidence—Confessions.*—In order that a confession may be received in a criminal case, it must be voluntary; it will be excluded, if it was induced by a promise of benefit or favor, or threat of intimidation or disfavor, by a person having authority in the matter.—State v. Jones, 478.

26. *Practice, criminal—Confessions—Admissibility of.*—When a confession has once been obtained by means of hope or fear, subsequent confessions are presumed to come from the same motive, and are inadmissible, unless it is shown that the original motives have ceased to operate.—*Id.*

27. *Practice, criminal—Confessions—Artifice.*—Confessions are not inadmissible because produced by artifice; *e. g.*, by persuading the prisoner, that his accomplices were in custody, or that they had divulged the facts relative to the crime.—*Id.*

28. *Criminal law—Corpus delicti—Confession, without other proof of.*—A conviction of murder is not warranted when there is no other proof of the *corpus delicti* but the uncorroborated confession of the accused.—State v. German, 526.

See Crimes and Punishments.

PRACTICE, SUPREME COURT.

1. *Practice, civil—Chancery cases—Issues referred to jury—Whether their verdict can be examined in Supreme Court.*—The verdict of a jury, upon issues referred to it by the court in a chancery case, is not properly reviewable in the Supreme Court. The lower court may disregard the verdict, and decide upon the issues, or may refer them to another jury. (W. S., 1041, § 13.)—Weeke v. Senden, 129.

2. *Practice, civil—Exceptions—Reversal.*—Where no exceptions are taken to the rulings of the lower court, this court will not reverse the case on the ground of such rulings.—Berry v. Smith, 148.

3. *Practice—Supreme Court—General judgment on all the counts—New trial, motion for—Reversal.*—The Supreme Court will not reverse a cause, because a general judgment on all the counts was rendered for the plaintiff, when such objection was not brought before the lower court in the motion for a new trial.—Fickle v. St. L., K. C., & N. R. R. Co., 219.

PRACTICE, SUPREME COURT, continued.

4. *Objections—Grounds of, not specified or mentioned in motion for new trial—Effect of omission.*—Where the grounds of objection are not specified, and the attention of the court is not called to them, in motion for new trial, they will not be regarded by the Supreme Court.—Curtis v. Curtis, 351.

5. *Stare decisis—Rule, when binding.*—This court will hesitate to interfere with previous adjudications, where on the faith of such decisions property has been acquired or money invested.—State, *ex rel.* Dobbins v. Sutterfield, 391.

6. *Equity suits—Instructions in, improper.*—In equity suits, declarations of law are not proper, and if given will be disregarded by this court.—Gill v. Clark, 415.

7. *Non-suit in equity will not bring law and fact up to the Supreme Court.*—A non-suit with leave to move to set it aside, will bring before the Supreme Court the questions of law and fact passed upon by the trial court, only when the non-suit is taken in a case at law. In equity cases the court below must adjudicate upon the law and the facts in order to bring them up on appeal or writ of error.—*Id.*

See Equity, 5; Practice, civil—New Trials; Practice, criminal, 4, 5, 6, 7.

PRESBYTERIAN CHURCH.

1. *Presbyterian church—General Assembly—Decree against signers of "Declaration and Testimony"—Effect of—Property rights—Exscinded congregation carries with it property conveyed in trust for its use.*—The decree rendered by the General Assembly of the Presbyterian church against the signers of the "Declaration and Testimony" which declared them to be incapable of sitting in any church judicatory higher than a session, did not excommunicate them as church members, or depose them from their ministerial office nor in any manner treat them as individual members of the church or congregation; and where property had been conveyed to be held for the use of a congregation, that is, for the members of the church composing the congregation, and such church had been cut off by such decree, the property was cut off with them. They could only cease to be members by voluntarily withdrawing or by excommunication, and this decree did not accomplish either their withdrawal or excommunication; and under such conveyance, there was no such implied condition of adherence to the general organism as should work a forfeiture or transfer of property to a new congregation when such adherence is dissolved, not by the direct action of the local body, but by that of the superior judicatory, and without any of the forms of judicial inquiry or trial.—Watson v. Garvin, 353.

Per Adams, Judge; Napton, Sherwood and Vories, J. J., concurring; Wagner, J., dissenting.

2. *Presbyterian church (Old School)—General Assembly—Deliverance on subject of slavery and loyalty—Competency of—Declaration and Testimony, signers of—Decree against, invalid—Property rights, not affected by.*—Under § 4 of the constitution of the Presbyterian church (Old School) which provides, that "Synods and councils are to handle or conclude nothing but that which is ecclesiastical; and are not to intermeddle with civil affairs which concern the commonwealth, unless by way of humble petition in cases extraordinary; or by way of advice for satisfaction of conscience, if they be thereunto required by the civil magistrate," the General Assembly of that church was prohibited from making deliverances on the subject of slavery and loyalty and the obligations of the church in that regard, and such deliverances were therefore nullities as far as property rights are concerned; and the decree rendered by the General Assembly, declaring that the signers of a paper called the Declarations and Testimony," inveighing against such "deliverances," "should not be allowed to sit in any church judicatory, higher than a session, and that if they or any of them should be enrolled as entitled to a seat in any Presbytery, such Presbytery, should, *ipso facto* be dissolved, and

PRESBYTERIAN CHURCH, continued.

the members adherring to the General Assembly were thereby authorized and directed to take charge of the Presbyterial records—to retain the name, and exercise all the authority and functions of the original Presbytery until the next meeting of the General Assembly," was also, as far as property rights were affected, a nullity.—*Id.*

3. *Ecclesiastical and civil courts—Relative jurisdiction—Property rights.*—Civil courts do not interfere with the decrees of ecclesiastical courts when no property rights are involved, because the civil courts have no jurisdiction in such matters and cannot take cognizance of them at all, whether they have been adjudicated by those tribunals or not. But when property rights are concerned the ecclesiastical courts have no power whatever to pass on them so as to bind the civil courts. If a member of the church feels himself aggrieved in his rights of property by the action of an ecclesiastical tribunal, he may resort to the civil courts, and they will not consider themselves precluded by the judgment of this tribunal.—*Id.*

PRESUMPTION; See Elections, 1; Limitations, 2; Practice, criminal, 8; Railroads, 4, 5.

PROTEST; See Bills and Notes.

PUBLICATION; See Practice, civil, 8.

## Q.

QUO WARRANTO; See Bonds, railroad, 5.

## R.

RAILROADS.

1. *Railroads—Brakeman, injuries to—Station agents—Conductors—Services of physicians.*—Station-agents and conductors of a railroad are not authorized, by virtue of their positions, to employ a physician at the expense of the railroad to attend to one of its brakemen injured by its cars.—Tucker v. St. L., K. C. & N. R. R. Co., 177.

2. *County Court—Railroads—Subscirption before articles filed—Collector, action against.*—A subscription of stock ordered by a county court to a railroad company, before its articles of association have been executed or filed with the Secretary of State, is illegal and void. But where the county court orders the levy of a tax to meet the subscription, and the collector proceeds to enforce its collection, a tax-payer cannot have his action to recover back the amount so collected from him. His remedy is by proceeding to arrest the execution of such illegal subscription, and the State may, through her legal representatives, arrest the issue of the bonds.—Rnby v. Shain, 207.

3. *Railroads—Injuries to cattle—Double damages—Statute, construction of—Who to be plaintiff.*—In a suit against a railroad for double damages for injuries to cattle, brought under the statute (W. S., 310, § 43), the party injured is the proper plaintiff. [Hudson vs. St. Louis, K. C. & N. R. R., 53 Mo., 525, affirmed.] Fickle v. St. L., K. C. & N. R. R. Co., 219.

4. *Railroads—Killing of cattle—Lack of fences—Presumption.*—If a person's cattle are killed on a railroad track, where the track passes through his inclosed field, at a point which was not a public crossing and where there was no fence, the presumption is, unless the circumstances of the case rebut it, that the cattle, strayed on the track on account of the absence of the fence [Aubuchon vs. St. Louis & I. M. R. R., 52 Mo., 522].—*Id.*

5. *Practice, civil—Trials—Evidence—Railroads—Killing cattle—Presumptions*—When it is shown in evidence, that cattle were killed by a railroad company where their track passed through uninclosed prairie land, and where the track was not fenced, and where there was no road-crossing, the law presumes negligence on the part of the company.—Lantz v. St. Louis, K. C. & N. R. R. Co., 228.

RAILROADS, continued.

6. *Justices' courts—Railroads—Statement—Jurisdiction—Surplusage.*—In a suit against a railroad before a justice of the peace, the statements filed stated the cause of action and claimed $50 damages, and afterwards asked double damages "in accordance with the statute in such cases made and provided." *Held*, that the request for double damages might be disregarded as surplusage, and that the justice had jurisdiction of the cause.—Grau v. St. L., K. C. & N. Rly. Co., 240.

7. *Railroads—Accidents—Damages by cattle—Statement of cause of action—Double damages—Statute, construction of.*—In a suit for damages by a railroad, it appeared by the allegations and evidence, that one of its trains was wrecked, where the track ran through plaintiff's field; that there was no fence along the track; that the hogs and cattle in the train were necessarily turned into the field in the attempt to extricate them from the wreck; that they were collected together and driven away, and that while in the fields they damaged the crops. There was no allegation that the damage was caused by the failure of the railroad to construct or maintain fences or cattle-guards, as required by law. *Held*, that in such case the statute (W. S., 310-11, § 43) did not contemplate the allowance of double pamages.—*Id.*

8. *Railroads—Lands, condemnation of—Substantial compliance with the law.*—When the law, concerning condemnation of lands for railroads (Wagn. Stat., 326, Art. 5), is substantially complied with, and a sufficient certainty is used to prevent surprise, or so much as not to mislead, it is all that the law requires.—The Q., M. & P. R. R. Co. v. Kellogg, 334.

9. *Railroads—Lands, condemnation of—Notice to owners.*—A notice to parties of proceedings to condemn their land for railroads (Wagn. Stat., 327, § 2), which informs them that commissioners are to be appointed to assess damages to them accruing from the passage of the road over their lands, describing the lands, is sufficient, inasmuch as they cannot be mislead.—*Id.*

10. *Railroads—Lands, condemnation of—Petition for—Report of commissioners—Description of land.*—A petition for the condemnation of lands for a railroad (Wagn. Stat., 326-7 § 1,) stated, that the railroad had been finally located through the land of the defendant, and that stakes had been driven along the centre of the track where it passed over his land, that the strip intended to be occupied was 100 feet wide running in a north west direction across his land (giving the numbers of the land according to the Government surveys), and that a profile and plat of the road as located had been made and filed in the office of the clerk of the county. The report of the commissioners followed the description in the petition, and referred to the profile and plat filed as furnishing a more specified description. *Held*, that the description was sufficient.—*Id.*

11. *Statute, construction of—Lands, condemnation of, for railroads—Joinder of defendants.*—The provision of the Statute (Wagn. Stat., 328, § 5) authorizing the joinder, as defendants, of those persons living in the same County or Circuit, in proceedings to condemn lands for railroads, is equivalent to saying that other persons, not residing in said County or Circuit, cannot be joined with them.—*Id*

12. *Railroads—Lands, condemnation of—Improper joinder—Estoppel.*—If a party improperly joined with others in proceedings to condemn lands for railroads, should appear and take any steps in the case without objecting to such misjoinder, or should, after the damages were assessed, receive the amount assessed he might be estopped from objecting to the validity of the proceedings.—*Id.*

13. *Railroad companies—Responsibility of, for dog left with baggage master.*—The owner having a dog on a railroad train, being informed by a brakeman and the baggage master, that the animal was not allowed in the passenger car, placed him in charge of the baggage master, and paid the latter for his transportation. By the regulations, which were posted and printed at the various stations, "live animals" were "allowed as baggagemen's perquisites." No special notice of this rule was brought home to the owner. Company held liable for loss of the dog by the baggageman.—Cantling v. Han. & St. Joe. R. R. Co., 385.

RAILROADS, continued.

14. *Railroads—Claim for wages due from contractors—Notices—Statute, construction of.*—A notice to a railroad, that a contractor on their road is in arrears to his hands, which substantially complies with the statute (Wagn. Stat., 302, § 40), so as to prevent any misapprehension, is sufficient.—Cosgrove v. Tebo & N. R. R., 495.

15. *Railroads—Contractors—Accounts of laborers—Admissions.*—The account of a laborer for work on a railroad under a contractor, signed by the contractor, is not evidence against the railroad company as its admission, unless the authority to make such admissions is established.—*Id.*

See Bonds, Railroad.

RAILROAD, ALEXANDRIA & BLOOMFIELD; See Bonds, Railroad, 3.

REGISTRATION: See Elections, 1, 2, 3.

RES GESTÆ; See Evidence, 13.

REVENUE.

1. *Practice, civil—Money had and received—Suit against collector of taxes for money received by him for taxes.*—A. sued by B. for money had and received by B. to A.'s use. The only evidence in the case was, that B. was the collector of taxes, and as such received this money in payment of A.'s taxes. *Held*, that after the reception of this money by B. it no longer belonged to A., but to the state and county, and that A. had no standing in court.—Davis v. Bader, 168.

2. *Taxes—Collector's failure to credit payment—Twice paid—How recovered back.*—If B. the collector, returns A.'s taxes as delinquent when he has paid them, and A. has been compelled to pay them twice, it may be, that A. may recover them back from B., or be substituted to the rights of the state and county.—*Id.*

3. *Railroads, subscription to—Bonds, taxes to pay interest on—County Court—Railroad—The State as plaintiff.*—In a suit to enjoin the collector from collecting taxes levied to pay the interest on bonds (alleged to be illegal) issued to a railroad, the county court who issued the bonds and levied the tax, and the railroad should be made parties thereto. The State through its proper officers can bring such suits.—The State of Missouri *ex rel.*, Robinson v. Sanderson, 203.

See Forest park, 1, 4; Railroads, 2.

ROADS.

1. *Public roads, opening of—County Courts—Circuit Court, appeal to—Re-examination.*—In proceedings to open public roads, the circuit court, on appeal from the county court, shall proceed to hear and try the cause anew.—(Sess. Acts 1872, p. 146, § 50; p. 148, § 71.)—Jefferson county v. Cowan, 234.

2. *Inferior courts, circumscription of their powers—County Courts—Opening public roads—Petition.*— Inferior courts, and those of statutory origin, must be circumscribed within the confines of the statute, which gives them being. Hence, where a petition to the County Court, praying that a public road be opened, does not show that it was signed by at least twelve householders of the township or townships in which said road is desired, three of whom were of the immediate neighborhood, as required by statute, (Sess Acts 1872, p. 140, § 8), the County Court has no jurisdiction in the premises. *Id.*

## S.

ST. LOUIS, CITY OF.

1. *Social evil ordinance of St. Louis valid—General law repealed by charter.*—The power given to the city council of St. Louis, under the municipal charter of 1870, Art. III, § 1, (Sess. Acts 1870, 463–4) "by ordinance not inconsistent

ST. LOUIS, CITY OF, continued.

with any law of the State," ** "to regulate bawdy houses," operated as a repeal of the general statute prohibiting them, in respect to the city of St. Louis. And a city ordinance licensing them is valid, under the charter, notwithstanding the general inhibition of the statute, and a license taken out in conformity with the ordinance will shield them from criminal proceedings by the state. Such ordinance is not void as against public policy or good morals. The best indication of public policy is to be found in the action of the legislature. And there is no warrant to suppose that the law had any other purpose than the promotion of morality and health to the citizens.—The State of Missouri v. Clarke, 17.

2. *Constitution—Law unconstitutional in part, not wholly void.*—Unconstitutional provisions of a law do not render it void as to other and independent provisions.—*Id.*

PER J. VORIES, DISSENTING, SHERWOOD J., CONCURRING.

3. *St. Louis charter, granting authority to regulate brothels, not a repeal of general law.*—§ 19, Art. VIII, Ch. 42 of Statutes of Missouri (W. S., 502), prohibiting bawdy houses, is not repealed by the Charter of the city of St. Louis of 1870, Art. III, § 1. (Sess. Acts 1870, 463-4.) The general law prohibiting and the special law regulating brothels are not inconsistent.—*Id.*

ST. LOUIS COUNTY; See Practice, criminal, 23.

SALES; See Administration, 9; Fraudulent conveyances, 1, 2; Mortgages and Deeds of Trust, 1, 2; Sheriff's sales.

SALES, JUDICIAL; See Sheriff's sales; Trusts and Trustees, 2.

SEAL; See Bonds, judicial, 2, 3; Contracts, 3, 4.

SERVICE; See Evidence, 3; Justices' Courts, 1; Practice, civil, 1, 2, 3.

SET-OFF; See Administration, 10.

SHERIFF; See Practice, civil, 1, 2; Sheriffs' sales.

SHERIFFS' SALES.

1. *Sheriff's deeds—Recitals—Judgments—Executions.*—A sheriff's deed set out fully certain judgments, and also set out certain executions, but failed to couple the executions with the judgments, but the names of the parties and the amounts, as set out, were identical. *Held*, that it was inferrable that the executions were on these judgments, and that such omissions are not fatal to the deed, inasmuch as they could mislead no one.—Wack v. Stevenson, 481.

2. *Sheriff's sales—Executions, expiration of—Venditioni exponas.*—A sale by a sheriff under a *venditioni exponas* on an execution, which may have expired, is void.—*Id.*

3. *Sheriff's sale—Purchase at by party to judgment—By stranger—Reversal of judgment—Effect of.*—Where plaintiff in a judgment purchases at the execution sale, his title will be forfeited by a subsequent reversal of the cause. (See Holland *vs.* Adair, 55 Mo., 40.) But the title of a stranger, who purchases in good faith from said plaintiff in the judgment, and before the reversal of the same, will not be invalidated by such reversal.—Vogler v. Montgomery, 577.

4. *Homestead exemption—Construction of statute.—Claim not made by housekeeper—Fraudulent conveyance by.*—Under § 2 of the act concerning Homesteads, (Wagn. Stat., 697.) where a homestead is claimed, the sheriff cannot proceed with his levy, until he has ascertained by appraisers, in the mode directed by the act, the extent and value of the premises, and that they are beyond the limit protected against executions. And the claim is not lost when not asserted by the housekeeper or head of the family, or by reason of the fact that he had theretofore fraudulently conveyed away the property.—*Id.*

See Landlord and tenant, 1.

SLANDER.

1. *Slander—Words spoken in Dutch set out in English, etc.*—In slander when the petition charges that the words alleged to be slanderous were spoken in the

SLANDER, continued.

Dutch language, but only the English translation is set out, if defendant answers over, he cannot object at the trial to the introduction of evidence on the ground that the petition does not state facts sufficient to constitute a cause of action.—Elfrank v. Seiler, 134.

2. *Practice, civil—Slander—Trials—General verdict—Several Counts.*—In an action for slander, the petition containing several counts, a general verdict is proper, when the several counts contain the same slander uttered at different times.—Polston v. See, 291.

3. *Practice, civil—Trials—Evidence—Slander—Condition in life.*—The condition in life of the parties to a slander suit, is a proper subject of inquiry on the question of damages.—*Id.*

4. *Practice, civil—Trials—Slander—Evidence—Statements—Res gestæ.*—In an action of slander for charging plaintiff with stealing defendant's lumber, the declarations and acts of the plaintiff at the time of his taking the lumber are admissible in evidence, though the defendant was not present, as a part of the *res gestæ*.—*Id.*

5. *Practice, civil—Trials—Verdict—Slander—Crime—Plea of justification—What evidence required.*—In a slander suit for charging the plaintiff with the commission of a crime, wherein the defendant justifies the charge, the verdict must be for the plaintiff, if the jury have a reasonable doubt of the plaintiff's guilt.—*Id.*

Per SHERWOOD, Judge, dissenting.

6. *Practice, civil—Trials—Slander—Justification—Verdict—Preponderance of evidence.*—In an action of slander, when the answer justifies the language, the verdict should be in accordance with the preponderance of the testimony, as in other civil causes.—*Id.*

7. *Practice, civil—Trials—Instructions—Slander.*—In an action of slander for charging the plaintiff with theft, an instruction to the jury to find for the defendant, if they find that the plaintiff, in person, or by agent, took away the property, is wrong, because it omits the essential ingredient of felonious intent.—*Id.*

SPECIFIC PERFORMANCE; See Equity, 6; Frauds, Statute of, 2; Practice, civil—Pleading, 1.

STAMP; See Evidence, 6.

STATUTE, CONSTRUCTION OF.

1. *Statutes—Constitutionality of—Minors declared of age.*—It is too late now to question the constitutionality of an act of the legislature passed prior to 1865, declaring a minor of age and legally competent to transact his own business.—Shipp v. Klinger, 238.

2. *Statute—Construction of—Offenses—Parties designated as offenders—Liability of others.*—When a statute defining an offense designates one class of persons as subject to its penalties, all other persons are to be deemed as exonerated.—Howell v. Stewart, 400.

ADMINISTRATION, 10, (W. S., 1274, § 3).
ATTACHMENT, 1, (W. S., 189, § 42).
BONDS, RAILROAD, 3, (Sess. Acts, 1856-7, 94, § 11; Sess. Acts, 1861, 60, § 1) 6, 7, 9, 10, 11.
CORPORATIONS, 2, (W. S., 294, §§ 26, 28).
COUNTY-SEATS, REMOVAL OF, 1, (W. S., 405, § 22).
DAMAGES, 1, (W. S., 520, § 4).
DOWER, 1, 2, (W. S., 542, § 20); 3, (W. S., 539, § 5; W. S., 88, §§ 35, 36, 37).
ELECTIONS, 4, (W. S., 574, § 58).
EVIDENCE, 2, (W. S., 1372, § 1;) 7, (W. S., 519, § 2).
HOMESTEAD, 1, (W. S., 697, § 2).

STATUTE, CONSTRUCTION OF, continued.

JUSTICES' COURTS, 1, (W. S., 839, § 15).
LANDLORD AND TENANT, 1, (W. S., 642, § 3;) 2, (W. S., 880, § 15).
LIMITATIONS, 7, (W. S., 917, § 7).
PRACTICE, CIVIL—TRIALS, 2, (W. S., 1041, § 13).
PRACTICE, CRIMINAL, 4, 6, (W. S., 800, § 25;) 8, (W. S., 445, § 1;) 16, (W. S., 477, § 7;) 17, (W. S. 1090, § 26).
RAILROADS, 3, (W. S., 310, § 43;) 7, (W. S., 310-11, § 43;) 8, 9, 10, (W. S., 326-7, §§ 1, 2;) 11, (W. S. 328, § 5;) 14, (W. S., 302, § 10).
ROADS, 1, (W. S., 146-8, §§ 50, 71;) 2, (W. S., 140, § 8).
ST. LOUIS, CITY OF, 13, (Sess. Acts, 1870, 463-4, Art. III, § 1;) 3, (W. S., 502, § 19).
WILLS, 4, (W. S., 1365, § 9;) 5, (W. S., 1370, § 47).

STOCK-HOLDER; See Corporations, 1.

STOLEN PROPERTY; See Practice, criminal, 15.

STREETS; See Damages, 3.

SUBSCRIPTION; See Bonds, Municipal, 1, 2; Bonds, Railroad, 3, 4, 6, 7, 9, 10, 11; Railroads, 2.

SUMMONS; See Corporations, 6; Justices' Courts, 1.

SURETIES; See Administration, 8, 10; Infancy, 4.

SURPRISE; See Practice, civil—New Trials, 2, 3.

## T.

TRUSTS AND TRUSTEES.

1. *Trusts and Trustees—Limitations, statute of—Claim of title by trustee independent of the trusts.*—When a trustee denies the trust and openly claims the trust property by a title independent of the trust and adversely to the claim of the beneficiary, the statute of limitations will run in his favor.—Poe v. Domic, 119.

2. *Trusts and trustees—Redemption—Acceptance of part of land in satisfaction.*—Where a party at a judicial sale constitues himself a trustee, by deterring others from bidding, and the party entitled to redeem accepts a deed for part of the land tendered in satisfaction, it amounts to a bar to further redemption.—Bedford v. Moore, 448.

See Fraudulent conveyances, 1; Mortgages and Deeds of Trust.

## U.

UNDUE INFLUENCE; See Frauds, Statute of, 2:

UNITED STATES COURTS; See Courts, United States.

## V.

VENDOR'S LIEN; See Lien, vendor's.

VENUE; See Practice, criminal, 17, 24.

VERDICT; See Practice, civil—Trials, 11, 12.

VESTED ESTATE; See Wills, 5.

## W.

WILLS.

1. *Wills—Probate—Administrator, appointment of—Proofs—When contested.*—The appointment by the court of the executor named in the will, or, in case of his renunciation, of such person as the statute authorizes, as administrator

WILLS, continued.

with the will annexed, assumes, that the court has passed upon the sufficiency of the proofs and admitted the will to probate. But this assumption may be contested by the proper parties in due time.—Lackland, Adm'r v. Stevenson, 108.

2. *Wills—Probate—Wife, renunciation by—Sale of lands—Estoppel.*—A. made his will, appointing his wife executrix, but she by a written communication to the court declined to act, when an administrator with the will annexed was appointed by her consent and at her request, and the order appointing him recited that the will had been duly probated. The will was proved by the subscribing witnesses, and no objection was made to the sufficiency of the proof. It appeared by parol proof, that the widow was informed of her right to renounce the will, but declined to do so. The entry of the clerk of the court was, that the will had, "in due form of law, been exhibited, proved and recorded;" but there was no entry of any formal judgment of probate. Five years after the death of the testator the land conveyed in the will to the wife was sold by the administrator by order of court to pay the debts of the estate, and, seven years after the sale, the wife renounced the will and sued for dower in the land. *Held,* that the conduct of the wife amounted to an estoppel *in pais.—Id.*

3. *Executors—Deed—Subsequent probate of will.*—A will giving power of sale vests the title in the executor at the time of the testator's death, and his deed of the property, made before probate of the will, is a good conveyance, provided the will be subsequently probated.—Wilson v. Wilson, 213.

4. *Wills—Son not mentioned—Subsequent death—Son's widow—Vested estate—Statute, construction of.*—A. died, leaving a will wherein he neither mentioned nor provided for his son B. B. subsequently died, leaving a widow. *Held,* that A. died intestate as to B. (Wagn. Stat., 1365, § 9), and that the right and title of B. in the estate of A. became a vested interest on the death of A., and upon B.'s death passed to his representatives.—Schneider v. Koester, 500.

5. *Wills—Intestacy as to a child—Share, how obtained—Practice, civil.*—When a testator fails to mention or provide for one of his children in his will, the will is not invalid, and a suit to have the will set aside is not the proper remedy, but the testator dies intestate as to such child, and, if necessary, he can resort to § 47 of the chapter concerning Wills. (Wagn. Stat., 1370.)—*Id.*

See Administration, 5, 6; Dower, 3.

WITNESSES; See Evidence.